95-6360

Supreme Court, U.S.
FILED
OCT 18 1995
CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

MARGO NEFF, For Herself and
Those Similarly Situated,
Petitioner,

-against-

AMERICAN DAIRY QUEEN
CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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October 18, 1995

105 pp

QUESTIONS PRESENTED

I. WHETHER THE COURT OF APPEALS FOR THE FIFTH CIRCUIT ERRED IN HOLDING THAT THE ISSUE OF WHETHER A FRANCHISOR WAS AN "OPERATOR" OF ITS FRANCHISED RESTAURANTS FOR PURPOSES OF ADA CLAIM IS A QUESTION OF LAW, RATHER THAN A QUESTION OF FACT, THAT COULD BE RESOLVED THROUGH SUMMARY JUDGMENT, RATHER THAN THROUGH TRIAL.

II. WHETHER THE LOWER COURTS ERRED IN REFUSING TO REQUIRE FACT FINDING AT TRIAL TO DETERMINE WHETHER ADQ WAS AN "OPERATOR" FOR PURPOSES OF THE ADA'S PROHIBITION ON DISCRIMINATION IN PUBLIC ACCOMMODATIONS.

III. WHETHER THE COURT OF APPEALS ERRED IN HOLDING THAT THE CIVIL RIGHTS ACT DID NOT APPLY IN DETERMINING WHETHER ADQ IS AN "OPERATOR" OF ITS FRANCHISES FOR PURPOSES OF ADA.

PARTIES TO THE PROCEEDING

All of the parties are listed in the caption.

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II. THE DECISION BELOW RAISES AN IMPORTANT FEDERAL QUESTION OF FIRST IMPRESSION ABOUT WHETHER FRANCHISORS SUCH AS ADQ ARE "OPERATORS" FOR PURPOSES OF THE ADA'S PROHIBITION ON DISCRIMINATION IN PUBLIC ACCOMMODATIONS.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests that this Court issue a writ of certiorari to the Fifth Circuit Court of Appeals in order to review its judgment and opinion entered in this action on July 20, 1995. This is a case of first impression under the Americans with Disabilities Act, and the opinion below is in significant conflict with the Third, Eighth, and Tenth Circuit Courts of Appeal on issues of law.

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals is reported at 58 F.3d 1063 (5th Cir. 1995), and reprinted in the Appendix to this Petition. The opinion of the District Court for the Western District of Texas is reported at 879 F.Supp. 57 (W.D.Tex. 1995) and also reprinted in the Appendix.

JURISDICTION

The final judgment of the Court of Appeals for the Fifth Circuit was entered on July 20, 1995. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

AMERICANS WITH DISABILITIES ACT,
42 U.S.C. § 12101(a)(1)(2):

The Congress finds that-

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem....

42 U.S.C. § 12181(7)(B):

The following private entities are considered public accommodations ... if the operations of such entities affect commerce...a restaurant...or other eating establishment serving food or drink.

42 U.S.C. § 12182(a):

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12188:

The remedies and procedures set forth in section 2000a-3(a) of this title [Civil Rights Act of 1964] are the remedies and procedures this subchapter provides to any person who is being subjected to discrimination on the basis of disability in violation of this subchapter.

AMERICANS WITH DISABILITIES ACT,
Department of Justice regulations:

28 C.F.R. § 36.203(a):

A public accommodation shall afford goods, services, facilities, privileges, advantages, and accommodations to an individual with a disability in the most integrated setting appropriate to the needs of the individual.

28 C.F.R. § 36.304(a):

A public accommodation shall remove architectural barriers in existing facilities, including communication barriers that are structural in nature, where such removal is readily achievable.

28 C.F.R. § 36.304(b):

> Examples of steps to remove barriers include, but are not limited to, the following actions...installing ramps; making curb cuts in sidewalks and entrances; ...rearranging tables, chairs...and other furniture; repositioning telephones...; widening doors; installing offset hinges to widen doorways; ...installing accessible door hardware; installing grab bars in toilet stalls; rearranging toilet partitions to increase maneuvering space; insulating lavatory pipes under sinks to prevent burns; installing a raised toilet seat; installing a full-length bathroom mirror; repositioning the paper towel dispenser in a bathroom; creating designated accessible parking spaces; [and} installing an accessible paper cup dispenser at an existing inaccessible water fountain.

STATEMENT OF THE CASE

The specific issue in this important case of first impression is whether American Dairy Queen (ADQ), a franchisor, is an "operator" of its franchised restaurants within the meaning of the ADA and, if so, the extent of its obligation under the ADA to ensure that its franchises comply with the ADA.[1] The ADA itself does not define "operates."

The Court of Appeals rendered a decision after factually assessing the degree of operational control that ADQ exercises over its franchises. Rather than candidly admitting it was construing facts, which it may not do, the Fifth Circuit held this

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[1]Petitioner does not take the position that this necessarily is an "either/or" situation: either the franchise or the franchisor has ADA liability. Indeed, as Petitioner argued to the Court of Appeals, there may be joint liability in some areas of responsibility, but this is part of the fact finding endeavor inappropriately undertaken by the Court of Appeals.

issue was a question of law that could be resolved through summary judgment and that ADQ was not an "operator" for purposes of ADA's prohibition on discrimination in public accommodations.

The facts giving rise to this litigation can be summarized briefly. In February 1994, Margo Neff, for herself and as a class representative for those similarly situated, filed suit in County Court at Law No. 5 of Bexar County, Texas, against ADQ, alleging that two of its Dairy Queen franchises in San Antonio, and others in Bexar County, were inaccessible to persons with physical disabilities. Her complaint sought declaratory and injunctive relief, as well as attorney's fees, under Title III of the Americans with Disabilities Act.

ADQ removed the case to United States District Court, and Petitioner amended her complaint to include state-wide relief at all DQ restaurants in Texas. ADQ filed and lost a motion to dismiss for failure to state a claim upon which relief could be granted and then moved for summary judgment which the district judge granted on July 14, 1994, on the issue of franchise control.[2] The judge ruled that the ADQ franchise agreement did not give ADQ sufficient enough control over the franchises in the lawsuit such that ADQ would be considered responsible in any fashion for assuring ADA requirements in the DQ restaurants.

Ms. Neff appealed the district court's final judgment and the United States Department of Justice filed an amicus curiae brief in support of her position. The Court of Appeals, however, affirmed the district court's decision on July 20, 1995.

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[2]Because of the motion to dismiss, then followed almost immediately by the motion for summary judgment, Petitioner did not have the opportunity to conduct discovery in the case. This put her at a substantial disadvantage in responding to the documentation ADQ selectively presented to the court and prevented her from developing a factual record to show the day-to-day impact of the ADQ franchise agreement and its control over the franchises.

Margo Neff must use a wheelchair for physical mobility. Because she, and others like her, could not have access to Dairy Queen restaurants in Texas, she brought suit against American Dairy Queen (ADQ), the parent company of DQ franchised restaurants.

Ms. Neff's contended that the Dairy Queen stores in San Antonio did not comply with Title III and were generally inaccessible, using examples of specific ADA violations such as inadequate sidewalk ramps for access to facilities and wholly inaccessible restrooms as illustrative of the widespread non-compliance in DQ restaurants throughout San Antonio and Texas.

Ms. Neff argued that, as the franchisor of the two Dairy Queen stores, and others like them throughout Bexar County, ADQ had a sufficient enough degree of operational control over the franchises so as to require ADQ to assure franchise compliance with Title III accessibility requirements. Alternatively, she argued that ADQ and the franchises had joint ADA liability. Further, by the time she filed suit on February 24, 1994, ADQ was two years past the compliance date required by the ADA (January 26, 1992).

Margo Neff and the class members she represents are protected by the Americans with Disabilities Act. In passing the ADA, Congress identified some 43 million Americans, like Plaintiff and members of her class, as having one or more disabilities and found that discrimination against such individuals continues to be a pervasive social problem. 42 U.S.C. § 12101(a)(1)-(2). Congress also found that society tended to isolate and segregate individuals with disabilities; and, despite some improvements, discrimination against individuals with disabilities continues to be serious problem. ADA, Pub. L. No. 101-336, § 2(2), 104 Stat. 328 (1990).

Title III of the ADA protects individuals, such as Ms. Neff and the class members, from discrimination on the basis of disability by private businesses, like Dairy Queen franchises, that

operate and provide public accommodations. Title III provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a).

Title III's implementing regulations require that a "[p]ublic accommodation shall afford goods, services, facilities, privileges, advantages, and accommodations to an individual with a disability in the most integrated setting appropriate to the needs of the individual." 28 C.F.R. § 36.203(a).

The implementing regulations further require public accommodations to "[r]emove architectural barriers in existing facilities, including communication barriers that are structural in nature, where such removal is readily achievable." 28 C.F.R. § 36.304(a). Examples of steps to remove barriers include, but are not limited to, such actions as "[i]nstalling ramps ... widening doors; installing offset hinges to widen doorways; installing accessible door hardware; installing grab bars in toilet stalls; rearranging toilet partitions to increase maneuvering space; insulating lavatory pipes under sinks to prevent burns; installing a raised toilet seat; installing full-length bathroom mirror; repositioning the paper towel dispenser in a bathroom; [and] creating designated accessible parking spaces . . . ." 28 C.F.R. § 36.304(b). The Dairy Queen franchise restaurants were wholly deficient in these matters of compliance.

Because Ms. Neff and others must use a wheelchair for mobility, certain accommodations are necessary to allow her access to public buildings, goods, and services. These accommodations with regard to Dairy Queen restaurants are required by the ADA.

ADQ franchises 798 restaurants across Texas and, Petitioner contends, is subject to ADA requirements because it is a private entity that operates and provides public

accommodations, as defined in Title III of the ADA. 42 U.S.C. § 12181. ADQ is also an entity that affects commerce and offers public accommodations. Id. § 12181(7)(B).

Despite its duty to do so, ADQ systematically failed and refused to assure, at least jointly, the provision of accommodations necessary to allow the full use and enjoyment of DQ restaurant facilities by individuals with disabilities, even though such accommodations are readily achievable. As a result of ADQ's practices, policies, and procedures, Ms. Neff and the class members have been, and continue to be, excluded from access to the DQ restaurants at issue in this case.

REASONS FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT COURT OF APPEALS IS IN DIRECT CONFLICT WITH THE THIRD CIRCUIT COURT OF APPEALS IN HOLDING THAT THE ISSUE OF WHETHER A FRANCHISOR IS AN "OPERATOR" OF ITS FRANCHISE(S) IS A QUESTION OF LAW, RATHER THAN A QUESTION OF FACT, THAT CAN BE RESOLVED THROUGH SUMMARY JUDGMENT, RATHER THAN THROUGH TRIAL.

The decision below is in direct conflict with the Thrid Circuit Court of Appeals in Drexel v. Union Prescription Centers, Inc., 582 F.2d 781 (3rd Cir.1978). Drexel was a vicarious liability action in which the Third Circuit held that summary judgment absolving a franchisor from liability because it claimed that it was not in control of its franchisee's store was improper: a franchise agreement between the parties raised genuine issues of material fact regarding the nature of the relationship between the franchisor and franchisee. In the decision below, the Fifth Circuit held that whether the franchise

agreement in question made the franchisor an operator, and therefore liable under the ADA, was a question of fact that could be properly determined through summary judgment.

Summary judgment is appropriate only when the record discloses "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). In reviewing a summary judgment, the Court of Appeals applies the same standard of review as did the district court. Cockerham v. Kerr-McGee Chemical Corp., 23 F.3d 101, 104 (5th Cir. 1994). The pleadings, depositions, admissions, and answers to interrogatories, together with affidavits, must demonstrate that no genuine issue of material fact remains. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). To that end the court must "review the facts drawing all inferences most favorable to the party opposing the motion." Reid v. State Farm Mut. Auto. Ins. Co., 784 F.2d 577, 578 (5th Cir. 1986). If the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

Once a movant meets its initial burden by offering proof of an absence of disputed fact, the opponent must set forth "specific facts showing that there is a genuine issue for trial." Celotex Corp., 477 U.S. at 323 (Fed. R. Civ. P. 56(e)). The court must then determine whether the facts presented are sufficient to permit a jury to find for the non-movant. "[T]he judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson v. Liberty Lobby, 477 U.S. 242, 249 (1986).

Both the Court of Appeals and the trial court failed to adhere to the foregoing standards and thus erred in summarily disposing of this case without appropriate fact finding. The summary judgment evidence that ADQ presented to the trial judge merely raised a question of fact; it did not at all establish

the absence of ADQ's operational control of its franchised restaurants, as a matter of law. The trial judge took upon himself the task of weighing the evidence in determining what constitutes control; his action was clearly improper. Id. The Court of Appeals fell into the same error.

Under its franchise agreements, ADQ retains substantial control over the operations of its franchisees, rendering ADQ liable (or jointly liable) as one that "operates a place of public accommodation" under the ADA. 42 U.S.C. § 12181(7). Most significant with regard to this litigation are the franchise provisions under which ADQ requires specific construction and equipment for its franchisees and retains final authority to dictate site modifications. (See franchise agreement at A-39 §§ 5.1-5.3).[3] The evidence, thus, is sufficiently contested so as to require fact finding and a trial to assess how the actual implementation of the agreement is carried out before a court would be able to make an informed decision as to whether the level of ADQ's control over site modifications is insufficient to render it an operator for purposes of the ADA. See Singleton v. International Dairy Queen, Inc., 332 A.2d 160 (Del. 1975).

In Drexel, the Third Circuit addressed a situation very similar to the one in this case. Drexel involved vicarious liability litigation in which negligence was alleged against a pharmaceutical franchisor as a result of a franchise that improperly refilled a prescription. 582 F.2d at 783. Arguing that it "was not at any time material to plaintiff's cause of action, the owner, operator, possessor, or in control" of its franchisee's store, the defendant franchisor successfully won summary judgment. Id. at 783-84.

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[3]ADQ also argues that a provision in its franchise agreement requiring its franchisees to comply with applicable laws insulates it from ADA liability. However, a franchise agreement may not excuse a franchisor or franchise from a duty imposed by law. The agreement may apportion costs of compliance between them, but it cannot excuse either from its legal responsibilities.

On appeal, the Third Circuit reviewed the terms of the franchise agreement executed by the franchisor and the franchisee drugstore and cited over 25 provisions, many of which are similar, if not virtually identical, to those in ADQ's franchise agreement at issue in this case. Id. at 786. Some of the Drexel franchise agreement's provisions in fact were less restrictive of the franchisee, and exercised less control over the franchise, than the ADQ provisions in this case. For example, while both the Drexel and ADQ agreements control appearance and equipment at the facility site, only ADQ requires its own prior approval of site modifications. Id. at 787.

The Fifth Circuit declined to follow the reasoning in Drexel and held that whether the franchise agreement made a franchisor an operator for purposes of an ADA claim was a question of law. Neff v. American Dairy Queen Corp., 58 F.3d 1063 (5th Cir. 1995). The Fifth Circuit reasoned that this is a question of law because Petitioner did not allege that the meaning of the terms of the franchise agreement were ambiguous, a necessary prerequisite for a fact question in this context. Petitioner concedes the terms of agreement are not ambiguous. However, that is not the point here. The point at issue is implementation of the agreement: whether the agreement, as a factual matter and as put into practice, divests ADQ of any ADA liability. The Fifth Circuit's distinction on this point confuses the question of whether genuine issues of material fact exist regarding what the franchise agreement means for ADA purposes when it is interpreted and applied, with the question of what its literal words mean. Petitioner does not dispute the literal words of the franchise agreement: the ambiguity requiring fact finding rests with the interpretation and application of the agreement's terms.

Moreover, Drexel properly acknowledged that "the absence of evidence relating to *actual control* would not necessarily preclude the finder of fact from inferring that [a defendant franchisor] had the right to control the operation of

[its franchisee's business]." Id. at 786 n.7 (emphasis added). Consequently, despite the franchisor's assertions that it lacked operational control and finding that the record presented genuine issues of material fact regarding the "nature of the relationship" between the franchisor and the franchisee, the court reversed and remanded the cause. Id. at 790.

Another instructive case, also with facts rather similar to this situation and more intimately connected with ADQ, is Singleton v. International Dairy Queen, Inc., 332 A.2d 160 (Del. 1975). Singleton involved a negligence action against ADQ's parent corporation, which arose after a young girl fell through a glass door at a Dairy Queen restaurant. On motion for summary judgment and, once again, in the face of the defendant franchisor's argument that it retained no "continual or actual" operational control, the Delaware Supreme Court found summary judgment was precluded:

> When an entity can control the size, shape and appearance of its franchisor's establishment, impose the nationally known sign 'Dairy Queen' as the only sign for the premises, require all containers to show the name of the present company, dictate portion control, the size and shape of containers, the uniforms of the employees, subject the franchisor to the obligation to obey subsequent rules and regulations, reserve right to inspect the premises . . . name the suppliers and even dictate what else may be sold on the premises, there appears little else to establish agency. The very lifeblood of the agent is in the hands of the franchisor.

Id. at 162-63.

Both franchise agreements at issue in this case contain these same provisions found by Singleton to amount to

"excessive" control by the Dairy Queen franchisor. Id. See also American Dairy Queen Corp. v. Taxation & Revenue Dep't, 605 P.2d 251, 253 (N.M.1979) (stating "[t]he use of "Dairy Queen" and the *operation of the business* of the licensee and sub-licensee are *under* the *strict supervision and control of [ADQ]*") (emphasis added)).

ADQ's standard franchise agreement, which was presented to the courts below and is now before this Court, contains numerous, broad provisions which on their very face raise material fact questions regarding ADQ's control over its franchise operations involved in this litigation. While the preceding cases may rest on different legal theories or speak in different legal terms, the courts' analyses have a common focus: operational control, not the mere phrasing of the franchise agreements. Just as the Dairy Queen franchise agreement before the Singleton court (332 A.2d at 164), prevented rendition of summary judgment, the ADQ franchise agreement before the trial judge here should have prevented summary judgment and should have required reversal by the Court of Appeals.

The only substantive summary judgment evidence submitted by ADQ, other than the franchise agreement which is at the heart of this factual dispute, is an affidavit of ADQ's Vice President of franchise operations. This affidavit contains little more than a bare, self-serving denial that ADQ maintains control over its franchise operations, and a rather implausible denial at that. This evidence by no means establishes the absence of any genuine issue of material fact. Quite to the contrary, the evidence submitted by ADQ, the far reaching language of the agreement contrasted with the diminutive language in the affidavit, further illustrates the existence of fact issues for trial.

Even were it determined that the evidence is insufficient to raise a genuine issue of material fact regarding whether ADQ maintains sole control over its franchisee's operations, the

evidence is certainly sufficient for a reasonable trier of fact to find that ADQ and its franchisee are jointly liable, thus offering another reason for mandating a reversal of the district court decision. See Liberty Lobby, 477 U.S. at 249. See also U.S. Department of Justice, Americans with Disabilities Act Title III Technical Assistance Manual, (1992) (In any agreement or contract, the allocated responsibility for complying with particular provisions of the ADA is not effective as to complaining individuals, but is only effective as between the parties; and both parties ". . . remain fully liable for compliance with all provisions of the ADA relating to the place of public accommodation.").

II. THE DECISION BELOW RAISES AN IMPORTANT FEDERAL QUESTION OF FIRST IMPRESSION ABOUT WHETHER FRANCHISORS SUCH AS ADQ ARE "OPERATORS" FOR PURPOSES OF THE ADA'S PROHIBITION ON DISCRIMINATION IN PUBLIC ACCOMMODATIONS.

The Fifth Circuit recognizes that this issue is one of first impression and in essence concedes that this issue can only be resolved through fact-based analysis. The Court below phrases the issue to be resolved as one dealing with a franchisor which has "**limited control**". Neff v. American Dairy Queen, 58 F.3d at 1066 (emphasis added).[4] A determination of how much control a franchisor has over its franchises is recognized as the real test of whether a franchisor is an "operator" for purposes

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[4]Even the Court of Appeals recognized that ADQ had "supervisory authority" over the franchise (879 F.Supp. at 1068), but somehow still found that insufficient to raise the spectre of fact issue, inappropriate for summary judgment.

of the ADA. The Fifth Circuit's emphasis on whether ADQ "[s]pecifically controls the modifications of its franchises to improve their accessibility to the disabled", (id.), only reinforces this point. This can only be determined through fact-based analysis.

Once the Court of Appeals held that ADQ had "limited control", it admitted its improper fact finding. Where on the continuum of "control," a "limited" amount falls, and the degree of consequent ADA responsibility, is a fact issue which the Court of Appeals may not resolve and which it must depend on trial to resolve.

ADQ operates, or jointly operates, the 798 Dairy Queens in Texas (including those in Bexar County at issue) through a franchise agreement that very strictly delineates precise architectural, structural, operational specifications, and product quality, to which the franchisees must adhere.

ADQ's franchise agreement,[5] far from being the simple license ADQ would like to cast it for the courts (but surely not the franchises), defines very clear and specific ADQ controls and restrictions over its San Antonio franchises and equally clear and specific responsibilities and obligations of the San Antonio franchises to ADQ. Even if ADQ's franchise agreement at one time was a license, there is no doubt that it long ago evolved into a very prescriptive and "elaborate agreement under which the franchisee undertakes to conduct a business or sell a product or service *in accordance with the methods or procedures prescribed by the franchisor*, and the franchisor undertakes to assist the franchisee through advertising, promotion and other advisory services. "Franchise -- Black's Law Dictionary 592 (5th ed. 1979) (emphasis added),

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[5]A copy of the ADQ franchise agreement before the lower courts is attached to this petition for the convenience of the Court.

citing H & R Block, Inc. v. Lovelace, 493 P.2d 205 (Kan. 1972).[6]

ADQ's standard franchise agreement itself very explicitly sets out the nature and degree of its control over the franchisee in those critical areas that would affect ADA Title III accessibility. The following are relevant excerpts from the ADQ franchise agreement with the San Antonio franchisee:

....

> B. Company [ADQ] makes available ... a system to establish, equip and operate a retail store facility as part of the "Dairy Queen" system using distinctive, uniform and approved designs, equipment, supplies ... which the licensee desires to adopt and use to operate a

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[6]Interestingly, the court from which Black's Law Dictionary takes its definition of franchise found the franchise in that case was far more than a licensee:

> For our purposes here it is not necessary to categorize the franchise nor to distinguish it from other relationships, such as employee vis-a-vis independent contractor or the like, and we would not be heard to do so. Suffice it to say under the contract here defendant operated under plaintiff's name in providing a service in which enterprise plaintiff retained a considerable amount of control including prescribing of office hours, fees to be charged, methods and forms to be used, accounting periods, advertising and promotion and training of personnel, and upon breach of the contract by defendant, title to and possession of books, records, files and client lists vested in plaintiff. Under these facts we are inclined to view the contract is more akin to one of employment than to a contract for sale disposition of a business and sufficiently of that character to make strict construction against the promisee appropriate.

H&R Block, Inc., 493 P.2d at 212.

"Dairy Queen" retail store ... in accordance with this Agreement and the system standards and requirements established and periodically revised by the Company ....

.....

5.1 [Store Facility] The retail Store shall be constructed and equipped in accordance with Company's approved specifications and standards in effect at the time pertaining to design and layout of the building, and as to equipment, inventory, signage, fixtures, location and design and accessory features. Licensee shall not commence construction to the Store until he has received written consent of the Company to his building plans.

5.2 [Alteration] Any replacement, reconstruction, addition or modification in building, interior or exterior decor or image, equipment or signage, to be made after the Company's consent is granted for initial plans, whether at the request of the Licensee or of the Company, shall be made in accordance with written specifications which have received the prior written consent of the Company, which shall not be unreasonably withheld.

5.3 [Maintenance] The building, equipment and signage employed in the conduct of Licensee's business shall be maintained in accordance with requirements established periodically by Company, or

> reasonable, specific lists prepared by Company based upon periodic inspections of the premises by Company's representatives. Within a period of ninety (90) days after the receipt of any particular maintenance list, Licensee shall effect the items of maintenance designated therein including the repair of defective items and/or the replacement of unrepairable or obsolete items of equipment and signage. Routine maintenance shall be conducted in accordance with general schedules published by the Company.

Franchise Agreement at A-39.

ADQ's franchise agreement very specifically sets out the degree of its control over the franchisee in those critical areas that would affect ADA Title III accessibility and make it liable, at least jointly, for ADA compliance. ADQ engages in self-interested understatement by claiming it "enters into franchise agreements with individuals or entities (franchisees) under which ADQ licenses the franchisees to establish and operate retail businesses under the Dairy Queen trade name, to use the Dairy Queen Trademarks, and to use the Dairy Queen business system, methods, and sales promotion programs in connection with their Dairy Queen stores, in exchange for certain fees. Through its franchise system and agreements, ADQ makes available to its franchisees a system under which the franchisees can establish and operate retail stores as part of the Dairy Queen system." ADQ, through its franchisee agreement, not only licenses, but sufficiently operates, franchisees such that it incurs obligations under the ADA.

The public accommodations provided by ADQ at its franchised places of business are not accessible to persons with disabilities, in violation of the ADA. 42 U.S.C. § 12182(a). ADQ was required to be in compliance with the ADA on

January 26, 1992, now well over three years ago.

III. THE FIFTH CIRCUIT COURT OF APPEALS' DECISION CONFLICTS WITH THE EIGHTH AND TENTH CIRCUIT COURTS OF APPEAL IN REGARD TO WHETHER THE REMEDIES PROVIDED BY THE CIVIL RIGHTS ACT IN REGARD TO PUBLIC ACCOMMODATIONS APPLY IN DETERMINING WHETHER FRANCHISORS SUCH AS ADQ ARE "OPERATORS" FOR PURPOSES OF ADA.

Title III of the ADA speaks to "Any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182 (West Pamp. 1994). Of great importance is that Title III rights and remedies are the same as those available under the Civil Rights Act of 1964. Id. § 12188. Therefore, it is of no importance that "operates" is not defined within the ADA; the overriding principle is clear. Since a franchisor is held responsible under the Civil Rights Act, a franchisor is held responsible under the ADA.

Responsibility under the Civil Rights Act has evolved under a process mindful of the law's remedial purpose and liberally interpreting its provisions to that end. Davis v. Valley Distributing Co., 522 F.2d 827, 832 (9th Cir. 1975), cert. denied, 429 U.S. 1090 (1977). Two cases clearly demonstrate evolution under the Civil Rights Act toward the principle that responsibility follows control. Wheeler v. Hurdman, 825 F.2d 257 (10th Cir. 1987)(whether economic realities of organization gave rise to control); Bradley v. Pizzaco of Nebraska, Inc., 7 F.3d 795 (8th Cir. 1993)(whether a franchisor's policy made it liable in an employment discrimination case).

In Wheeler, the Tenth Circuit examined an economic realities test for determining the scope of protection under the Civil Rights Act. 825 F.2d at 271. The issue in Wheeler is whether a partner in a highly organized, centrally managed, business institution of indefinite and ongoing duration can properly be classified as an employee for purposes of the Civil

Rights Act.[7] Id. at 258.

Although Wheeler rejected the claims brought under the Civil Rights Act, it accepted the principle that a partnership might subject to the Act if the economic realities gave rise to control, and therefore, responsibility. Id. at 271. The Tenth Circuit concluded in a manner clearly inviting the piercing of corporate forms:

> There may be circumstances not fairly covered by our holding excluding bona fide general partners from coverage under the Acts. The bundle of partnership characteristics we have identified may be lacking in important particulars, or there may be some deception which compromises the actuality of those characteristics. As Justice Powell noted: "an employer may not evade the strictures of Title VII simply by labeling its employees as "partners." *Nishon*, 467 U.S. at 79 n.2. Those and similar circumstances expose the basic status of "bona fide general partner" to question and examination.

825 F.2d at 277. It is clear that, under the Civil Rights Act, a partner can be considered an employee, although "partner" is not included within the definition of "employee."

In Bradley, the Eighth Circuit, without hesitation, found a franchisor liable for employment discrimination under the Civil Rights Act. 7 F.3d at 798. The issue in the case was whether the discharge for failure to follow the company's no beard policy by a black male with a skin condition constituted employment discrimination. Id. at 795.

Although the franchisor in Bradley was neither the employer, nor directly responsible for the discharge after only

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[7]In the Civil Rights Act of 1964, "partner" is not within the definition of "employee." 42 U.S.C. § 2000e.

two weeks of employment which gave rise to the claim, the franchisor was found liable on the employment discrimination claim because of its control of the company policy. Id. at 799. See also Bradley v. Pizzaco of Nebraska, Inc., 939 F.2d 610 (8th Cir. 1991).

In this case, the district court concluded that ADQ in its franchise agreements merely possesses a "veto" power over ADA compliance and as such is not covered by the ADA. This is clearly error; even if ADQ merely possesses a veto power over compliance with a civil rights statute, this control, in the light of the economic realities of the franchise agreement, is sufficient to give rise to liability when analyzed in the process employed by either the Wheeler or Bradley courts.

But ADQ's control is far in excess of a mere veto. The franchise agreement gives ADQ the authority to dictate the Title III ADA accessibility of the franchisee.[8] Moreover, it is very difficult to contemplate any aspect of the DQ restaurant's business that is not controlled by the Store Management

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[8]ADQ's standard franchise agreement contains the following provision:

> 5.3 The building, equipment and signage employed in the conduct of Licensee's business shall be maintained in accordance with requirements established periodically by Company, or reasonable, specific lists prepared by Company based upon periodic inspections of the premises by Company's representatives. Within a period of ninety (90) days after the receipt of any particular maintenance list, Licensee shall effect the items of maintenance designated therein including the repair of defective items and/or the replacement of unrepairable or obsolete items of equipment and signage. Routine maintenance shall be conducted in accordance with general schedules published by the Company.

Franchise Agreement at A-40.

Operations Manual.[9] It is inconceivable that such "control" provisions in the ADQ agreement do not give rise to any ADQ liability under the civil rights statute at issue in this case.

Apart from control, the existence of the licensing provision in the franchise agreement does not serve to insulate ADQ from its ADA responsibilities. In any agreement or contract, the allocated responsibility for complying with particular ADA provisions is not effective as to complaining individuals, but only as between the parties; and both parties "...remain fully liable for compliance with all provisions of the ADA relating to that place of public accommodation." Americans with Disabilities Act Title III Technical Assistance Manual , Supra. *See also* 28 C.F.R. §§ 36.102-104.

The Court of Appeals summarily dismissed this issue without analytical foundation, thus putting itself in conflict with the Eighth and Tenth Circuits, yet another reason the Court should accept this case for review.

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[9]ADQ's standard franchise agreement contains the following comprehensive "control" provision:

> 6.7 Licensee shall adopt and use as his continuing operational routine the standard "Dairy Queen" management system, as prescribed in the Store Management Operations Manual, including Company's standards with respect to product preparation, merchandising, employee training, equipment and facility maintenance and sanitation. Company will revise the Manual and these programs periodically to meet changing conditions of retail operation in the best interest of "Dairy Queen" retail stores. During and after the term of this Agreement, Licensee shall keep the Manual Product Preparation Charts and their respective contents strictly confidential, and in particular shall not duplicate or disseminate any such information to any third party other than Licensee's employees.

Franchise Agreement at A-45.

CONCLUSION

The importance of the issues involved in this case warrants the exercise of this Court's discretionary jurisdiction. Allowing the Court of Appeals decision to exclude franchisors from liability under the ADA will undermine the effective enforcement of the ADA, contrary to the intent of Congress. The impact of the Fifth Circuit's decision on individuals with disabilities will be profound. In enacting the ADA, Congress found that individuals with disabilities have historically been isolated and segregated by society 42 U.S.C., § 12101(a).

Insulating ADQ from liability would undercut the ADA's purpose of providing a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101 (b). Moreover, such insulation would necessitate that individuals with disabilities seek preservation of their civil rights against hundreds, if not thousands, of individual franchisees, all of whom may remain out of compliance, rather than focusing on the source and cause of non-compliance. In this case, this would mean seeking individual relief against 798 Texas Dairy Queen stores step by step across Texas, a truly insurmountable task of cost and time for persons with disabilities. Absolving franchisors from responsibility under the ADA is particularly distressing when the franchise agreement, as in this case, gives the franchisor the control necessary to achieve compliance. Control creates ADA responsibility.

Singleton aptly characterized private franchising as a "multi-billion dollar entrepreneurial goliath." 332 A.2d at 162. In such an industry governed by pervasive franchise agreements like that before this Court, under which franchisors maintain broad control, dictate facility construction, and retain final authority for site modification, summarily dismissing a well-founded charge of a franchisor's operational control threatens to defeat Congress' intent in enacting the ADA. See United States v. Rodriguez-Rios, 14 F.3d 1040, 1044-45 (5th Cir. 1994); Sutton v. United States, 819 F.2d 1289, 1292 (5th Cir. 1987).

Obliterated would be the long-standing principle of law, that "[a]ll statutes [in aid of the preservation of human liberty and human rights] and constitutional provisions authorizing such statutes are liberally and beneficially construed. It would be most strange, and in civilized law, monstrous were this not the rule of interpretation." Monell v. Dep't of Social Services, 436 U.S. 658, 684 (1978) (quoting 1 Storey on Constitution, sec. 429. Globe App., at 68).

The importance of the federal question involved in this case warrants this Court's exercise of its discretionary jurisdiction. The narrow interpretation the Fifth Circuit gave to the ADA and the applicable federal regulations undermines the fundamental purpose of the ADA and is at odds with the interpretation given this statute by the administrative agency charged with its enforcement, the Department of Justice (DOJ). DOJ strongly emphasized that:

> It is important to be able to enforce the ADA against a franchisor such as ADQ because it has the power to dictate how the stores are built and how they operate. Without the authority to reach franchisors that "operate" places of public accommodation, individuals with disabilities will not be able to receive the promise of the ADA to include them in the mainstream of American life.

Neff v. ADQ, DOJ Amicus Brief in the Fifth Circuit Court of Appeals at 9.

The Department of Justice agrees with Petitioner that the question of whether a franchisor "operates" a place of public accommodation is a question of fact. The Department also recognizes that a trial is necessary to allow Petitioner to introduce evidence to show that: "ADQ has retained the right to direct and control the structure of the facilities and many aspects of the day-to-day operations of its franchises, including maintenance of the facilities." Id.

For the reasons set forth, certiorari should be granted.

Respectfully Submitted,

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October 18, 1995

APPENDIX

Margo NEFF, for Herself and those similarly situated, Plaintiff,

v.

AMERICAN DAIRY QUEEN, INC., Defendant.

Civ. A. No. SA-94-CA-280.

United States District Court,
W.D. Texas,
San Antonio Division.

July 14, 1994.

Disabled customer brought action against fast food franchisor, alleging violation of Americans with Disabilities Act. On franchisor's motion for summary judgment, the District Court, Prado, J., held that franchisor did not have affirmative duty to enforce compliance with Act among its franchisees, absent showing that it effectively "operated" franchises.

Motion granted.

1. Federal Civil Procedure ~2544

Defendant moving for summary judgment need only present or designate evidence which negates or disproves existence of any essential element of opposing party's claim; once he has done so, non-movant must respond with specific factual showing that there is

genuine issue in dispute. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

2. Federal Civil Procedure ~2470.1

In order to survive motion for summary judgment, nonmovant must raise genuine dispute as to material fact; genuine disputes over irrelevant, immaterial or unnecessary facts will not render summary judgment inappropriate. Fed. Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

3. Civil Rights ~107(2)

Fast food franchisor did not have affirmative duty to enforce compliance with Americans with Disabilities Act among its franchisees, absent showing that it effectively "operated" franchises; although franchisor had right to approve all construction modifications, it could not require modifications to existing structures and had not exercised its approval rights in manner inconsistent with Act. Americans with Disabilities Act of 1990, § 302(a), 42 U.S.C.A. § 12182(a).

ORDER GRANTING SUMMARY JUDGMENT

PRADO, District Judge.

On this date came on to be considered Defendant American Dairy Queen Corporation's ("ADQ") Motion for

Summary Judgment, filed in the above-styled and numbered cause on June 14, 1994. After carefully considering all of the papers and pleadings on file, this Court is of the opinion that ADQ's motion should be granted.

BACKGROUND AND PROCEDURAL HISTORY

Ms. Neff originally filed this action in County Court of Law, Bexar County, Texas on February 24, 1994. Ms. Neff, who has a physical disability that requires a wheel chair to gain mobility, brought this action for herself and all those similarly situated pursuant to Title III of the Americans with Disabilities Act, 42 U.S.C § 12182. Ms. Neff's complaint alleges that ADQ operates and provides public accommodations in San Antonio that are inaccessible to people with disabilities. Specifically, she complains of a lack of proper parking places and loading areas; excessively heavy exterior doors; water fountains that cannot be used by people with disabilities; inappropriate access ramps; service counters that are too high; drive-through windows that are not accessible to the hearing impaired; and inaccessible public restrooms. Ms. Neff seeks injunctive and declaratory relief requiring compliance with the Americans with Disabilities Act and attorneys' fees and costs.

ADQ removed this action to this Court on April 1, 1994, pursuant to 28 U.S.C. § 1441 because this Court could have had original jurisdiction over this action pursuant to 28 U.S.C. § 1331. On that same date ADQ filed a motion to dismiss claiming, *inter alia*, that ADQ does not own, operate, or lease any of the premises covered by Ms. Neff's complaint. The Court denied that motion as ADQ offered no argument or evidentiary support. However, the Court did state that it would

reconsider ADQ's notion if ADQ provided more details as to its position. Order Denying Motion to Dismiss, filed May 6, 1994. ADQ now moves for summary judgment claiming that it does not own, lease, lease to, operate any Dairy Queen Stores in San Antonio and therefore, Ms. Neff has sued the wrong party to obtain the relief she requests.

ADQ notes that Dairy Queen Stores in San Antonio are owned and operated by R&S Dairy Queen, Inc. ("R&S"), a separate and distinct entity from ADQ. ADQ and R&S do not share common ownership, employees or management. R&S and ADQ have a franchise agreement under which R&S is allowed to operate Dairy Queen Stores. Ms. Neff contends that the franchise agreement between ADQ and R&S gives ADQ de facto operating control over Dairy Queen stores in Texas. Specifically, Ms. Neff points to the Facility Standards and Maintenance section of the Dairy Queen Operating Agreement between ADQ and R&S for one of the San Antonio Dairy Queen Stores. That section requires R&S to first obtain approval of building plans before beginning construction or making any modifications to an existing building.[1] Because the

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[1]Ms. Neff points to three paragraphs of the Dairy Queen Operating Agreement between ADQ and R&S for a single Dairy Queen Store. Paragraph 5.1 states:

> The retail Store shall be constructed and equipped in accordance with Company's approved specifications and standards in effect at the time pertaining to design and layout of the building, and as to equipment, inventory, signage, fixtures, location and design accessory features. Licensee shall not commence construction of the Store until he has received written consent of Company to his building plans. Licensee is solely responsible for obtaining all

Court concludes that the operating agreement does not give ADQ control over the subject premises for purposes of the Americans with Disabilities Act, the Court concludes that ADQ is entitled to summary judgment on Plaintiff's claims.

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necessary permits, licenses and/or architectural seals, and in all other respects complying with the applicable legal requirements relating to the building, signs and [unreadable]. Licensee shall be furnished with lists of approved equipment, fixtures and furnishings.

Paragraph 5.2 states:

> Any replacement, reconstruction, addition or modification in building, interior or exterior decor or image, equipment or signage, to be made after Company's consent is granted for initial plans, whether at the request of Licensee or Company, shall be made in accordance with written specifications which have received the prior written consent of Company which shall not be unreasonably withheld.

Finally, Paragraph 5.3 states:

> The building, equipment and signage employed in the conduct of Licensee's business shall be maintained in accordance with requirements established periodically by Company, or reasonable, specific lists prepared by Company based upon periodic inspections of the premises by Company's representatives. Within a period of ninety (90) days after the receipt of any particular maintenance list, Licensee shall effect the items of maintenance designated therein including the repair of defective items and/or the replacement of unrepairable or obsolete items of equipment and signage. Routine maintenance shall be conducted in accordance with general schedules published by Company.

STANDARDS FOR SUMMARY JUDGMENT

[1] The Court must address the standard to be applied in determining whether or not to grant summary judgment. Federal Rule of Civil Procedure 56 provides in pertinent part:

> **Motion and Proceedings [on Summary Judgment].** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed.R.Civ.P. 56(c). Defendant, though movant for summary judgment, will not carry the burden of proof at trial as to the issues the Court now faces. Under Supreme Court and Fifth Circuit case law regarding summary judgment, the movant need only present or designate evidence which negates or disproves "the existence of any essential element of the opposing party's claim." *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir.1986). Once movant has made this showing, the non-movant must the respond with a specific factual showing that

there is a genuine issue in dispute. *Celotex Corp. V. Catrett,* 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986); *Washington v. Armstrong World Industries, Inc.*, 839 F.2d 1121, 1123 (5th Cir.1988).

[2] In order to survive a motion for summary judgment, the non-movant must raise a genuine dispute as to a material fact. Fed. R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). Genuine disputes over irrelevant, immaterial or unnecessary facts will not render summary judgment inappropriate. *Id.; Williams v. Adams,* 836 F.2d 958, 961 (5th Cir.1988).

APPLICABILITY OF THE AMERICANS WITH DISABILITIES ACT

[3] The Americans with Disabilities Act states:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42. U.S.C. § 12182(a). In this case, the parties agree that ADQ

does not own, lease, or lease to any of the premises about which Ms. Neff complained. Instead, the parties debate whether ADQ operates the subject premises. Furthermore, Ms. Neff does not allege that ADQ refused to give its approval to construction plans or modifications that would bring Dairy Queen Stores into compliance with the act. Rather, Ms. Neff argues that ADQ has an affirmative duty to enforce compliance with the Americans with Disabilities Act, among its franchisees.

The Americans with Disabilities Act does not define "operates". In the context of this case, however, the Court concludes that ADQ does not operate the San Antonio Dairy Queen stores under any definition of the word. ADQ licenses other entities to use its trademark in compliance with standards established by ADQ. Although ADQ maintains the right to approve all construction plans and modifications, Ms. Neff has provided no evidence that ADQ can require an existing franchise to make modifications to an existing structure.[2] Nor

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[2]A case in the Northern District of Texas came to the same conclusion:

> As to the non-procedural grounds upon which Plaintiff seeks to establish that Defendant (ADQ) is exerting such control over its franchisee so as to be operating the restaurant. Plaintiff cites portions of the franchise agreement relating to construction, modification and maintenance of the facilities which require prior written consent of the franchisor before performing such acts. Notwithstanding, the ADA requires that the person liable either "own, lease (or lease to), or operate" the facility in question. Retaining architectural control cannot be tantamount to operating a facility which one does not own or lease.
>
> *Young v. American Dairy Queen, Inc.*, No. 5:93-CV-253-C 1994

has Ms. Neff shown that ADQ has exercised its approval rights in any way inconsistent with the Americans with Disabilities Act. Had ADQ refused to approve a franchisee's plans to bring a store in compliance with the act, then ADQ might be subject to liability. This Court concludes, however, that merely possessing a veto power over proposed plans and modifications does not constitute operating for purposes of Americans with Disabilities Act.

Cases cited by Ms. Neff for the proposition that a franchisor can be liable for violations of civil rights under other statutes by franchisees do not aid the Court in this case. In *Bradley v. Pizzaco of Nebraska, Inc.*, 7 F.3d 795 (8th Cir. 1993), the Eighth Circuit found that a franchisor could be liable for employment discrimination when a franchisee fired an employee for violations of a policy established by the franchisor. In the present case, Ms. Neff has produced no evidence that any Dairy Queen has failed to comply with the Americans with Disabilities Act because of a policy of ADQ.[3] Therefore, the Court concludes that ADQ does not control the San Antonio Dairy Queen stores for purposes of the Americans with Disabilities Act and summary judgment should be granted in favor of ADQ.

Accordingly, it is hereby ORDERED that ADQ's Motion for Summary Judgment is GRANTED such that

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WL 761233 (N.D.Tex., filed June 22, 1994)

[3]The case of *Wheeler v. Hurdman*, 825 F.2d 257 (10th Cir.1987), similarly provides no help for Plaintiff. That case addressed the question of whether a partner in a partnership could be considered an employee for purposes of the Civil Rights Act of 1964.

Plaintiff take nothing on her claims. It is further ORDERED that all other pending motions are DENIED AS MOOT.

NEFF v. AMERICAN DAIRY QUEEN CORP.

Margo NEFF, for herself and
those similarly situated,
Plaintiff-Appellant,

v.

AMERICAN DAIRY QUEEN
CORPORATION, Defendant
Appellee.

No. 94-50552.

United States Court of Appeals,
Fifth Circuit.

July 20, 1995.

Disabled customer brought action against restaurant franchisor, alleging violation of Americans with Disabilities Act (ADA). The United States District Court for the Western District of Texas, Edward C. Prado, J., granted franchisor's motion for summary judgment, 879 F.Supp. 57, and customer appealed. The Court of Appeals, Emilio M. Garza, Circuit Judge, held that restaurant franchisor's right under franchise agreement to set standards for building and equipment maintenance and to "veto" proposed structural changes did not make it "operator" of restaurant for purposes of ADA's prohibition on discrimination in public accommodations.

Affirmed.

1. Federal Civil Procedure ~2491.5

Whether franchise agreement made restaurant franchisor "operator" of franchised restaurants for purposes of ADA claim was question of law that could be resolved through summary judgment. Americans with Disabilities Act of 1990, § 302, 42 U.S.C.A. § 12182; Fed.Rules Civ.Proc.Rule 56(c), 28 U.S C.A.

2. Civil Rights ~107(2)

Restaurant franchisor's right under franchise agreement to set standards for building and equipment maintenance and to "veto" proposed structural changes did not make it "operator" of restaurant for purposes of ADA's prohibition on discrimination in public accommodations. Americans with Disabilities Act of 1990, § 302(a), 42 U.S.C.A. § 12182(a).

See publication Words and Phrases for other judicial constructions and definitions.

3. Civil Rights ~107(2)

In determining whether franchisor "operates" franchise for purposes of ADA's prohibition on discrimination in public accommodations, relevant inquiry is whether franchisor specifically controls modification of franchises to improve their accessibility to the disabled.

Americans with Disabilities Act of 1990, § 302(a), 42 U.S.C.A. § 12182(a).

4. Civil Rights ~107(2)

Restaurant franchisor's right to control numerous nonstructural aspects of franchised restaurants' operations, such as accounting, personnel uniforms and use of trademarks was irrelevant to question of whether franchisor "operated" franchises for purposes of ADA's prohibition on discrimination in public accommodations; relevant inquiry was whether franchisor, according to terms of franchise agreement, controlled modification of franchised restaurants to cause them to comply with ADA. Americans with Disabilities Act of 1990, § 302(a), 42 U.S.C.A. § 12182(a).

5. Civil Rights ~120

Civil Rights Act did not apply in determining whether restaurant franchisor was "operator" of franchises for purposes of ADA. Civil Rights Act of 1964, § 201 et seq., 42 U.S.C.A. § 2000a et seq.; Americans with Disabilities Act of 1990, § 308(a)(1), 42 U.S.C.A. § 12188(a)(1).

Appeal from the United States District Court for the Western District of Texas.

Before REAVLEY, GARWOOD and EMILIO M. GARZA, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

Margo Neff appeals from the district court's entry of summary judgment on her claims against American Dairy Queen Corporation ("ADQ") under the Americans with Disabilities Act, 42 U.S.C. § 12101-12213 (West Supp.1995) ("ADA"). We affirm.

I

ADQ owns the federally registered "Dairy Queen" trade name and various trademarks and service marks used in connection with the operation of licensed Dairy Queen stores. ADQ, through franchise agreements with franchisees throughout the United States, licenses franchisees to establish and operate Dairy Queen retail stores. Among those franchisees is R & S Dairy Queens, Inc., a Texas corporation that owns two Dairy Queen stores in San Antonio, one located at 13122 Nacogdoches (the "Nacogdoches Store"), and the other located at 9726 Perrin Beitel (the "Perrin Beitel Store") (collectively, the "San Antonio Stores").

Margo Neff is disabled and requires a wheelchair to gain mobility. Neff filed suit under section 308 of the ADA, 42 U.S.C. § 12188(a) (1988), alleging that ADQ had violated section 302 of the ADA, 42 U.S.C. § 12182, by failing to make the San Antonio Stores accessible to her.[1] In

[1]Section 302(a) provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public

her complaint, Neff pointed to numerous barriers that she alleged made the San Antonio Stores inaccessible to the disabled. Neff sought an injunction requiring ADQ to modify "its"[2] San Antonio Stores to eliminate the alleged barriers, a declaratory judgment concerning ADQ's violation of the ADA, and attorneys fees.[3]

ADQ moved for summary judgment on the grounds that it did not own, lease, or operate the San Antonio Stores and therefore was not responsible for removing the alleged barriers. Its summary judgment pleadings included an affidavit by ADQ's Vice President for Franchise Operations stating that ADQ neither owned nor operated the San Antonio Stores. ADQ also offered copies of the franchise agreements between ADQ and R & S Dairy Queens relating to the San Antonio Stores. According to ADQ, the

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accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a). Section 302(b)(2)(A)(iv) further provides that such discrimination includes the provides that such discrimination includes the "failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities, ... where such removal is readily achievable." 42 U.S.C. § 12182(b)(2)(A)(iv).

[2]In her complaint, Neff alleged that ADQ "owns" the San Antonio Stores.

[3]Neff also sought certification of a class of disabled consumers who were unable to access the San Antonio Stores. Neff later filed a motion for class certification, which the district court denied as moot when it granted ADQ's motion for summary judgment. Neff makes no argument regarding class certification on appeal.

agreements established as a matter of law that it did not "operate" the stores within the meaning of section 302.

In response, Neff contended that the terms of the franchise agreement between ADQ and R & S Dairy Queens regarding the Nacogdoches Store supported her claim that ADQ retained sufficient control over the operation of the San Antonio Stores to make it an "operator" of the stores for the purposes of section 302.

The district court granted summary judgment, *see Neff v. American Dairy Queen, Inc.*, 879 F.Supp. 57 (W.D.Tex.1994), concluding that the Nacogdoches Store franchise agreement established no more than that ADQ held the power to veto modifications to the store's facilities, and that this amount of control was insufficient to bring ADQ within the scope of section 302. Neff appeals from the district court's entry of summary judgment, contending that the existence of genuine issues of material fact regarding whether ADQ "operates" the San Antonio Stores should have precluded summary judgment on her ADA claims.[4]

II

We review a district court's grant of summary judgment de novo, applying the same standard as did the district court. *McDaniel v. Anheuser-Busch, Inc.*, 987 F.2d 298, 301 (5th Cir.1993). We "review the facts drawing all inferences most favorable to the party opposing the motion."

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[4]The United States has filed an amicus curiae brief supporting Neff's position, and the International Franchise Association has filed an amicus curiae brief supporting ADQ's position.

Reid v. State Farm Mut. Auto. Ins. Co., 784 F.2d 577, 578 (5th Cir.1986). Summary judgment is appropriate when the summary judgment record demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *accord Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2509-10, 91 L.Ed.2d 202 (1986); *Fraire v. City of Arlington*, 957 F.2d 1268,1273 (5th Cir.1992), cert. denied,----- U.S.------, 13 S.Ct. 462, 121 L.Ed.2d 371 (1992). "If the moving party meets the initial burden of showing that there is no genuine issue of material fact, the burden shifts to the non-moving party to produce evidence or designate specific facts showing the existence of a genuine issue for trial." *Engstrom v. First Nat'l Bank*, 47 F.3d 1459, 1462 (5th Cir.1995), *petition for cert. filed*, 63 U.S.L.W. 3892 (U.S. June 12,1995) (No. 94-2025).

A

[1] Neff argues that summary judgment was inappropriate in this case because genuine issues of material fact exist regarding ADQ's control over the restaurants in question. This argument raises the question of whether the issue that Neff and ADQ dispute is one of fact or one of law.[5] The only issue in dispute between the parties is whether ADQ's contractual rights under the Nacogdoches Store franchise agreement demonstrate that ADQ "operates" the San Antonio Stores. Neff's only summary judgment evidence, and the only basis for her claim that ADQ

[5]The United States specifically argues that the question is one of fact.

"operates" the San Antonio Stores, is the Nacogdoches Store franchise agreement, and "[t]he interpretation of an unambiguous contract is a question of law" which we review de novo. *Exxon Corp. V. Crosby-Mississippi Resources, Ltd.*, 40 F.3d 1474, 1481 (5th Cir. 1995). Neff has not alleged that the Nacogdoches Store franchise agreement is ambiguous. Indeed, the parties do not dispute the *meaning* of the terms of the agreement at all; rather, they dispute whether the control provided for in the agreement makes ADQ an "operator" of the store for the purposes of section 302, again a question of law which we review de novo. *See Matagarda County v. Russell Law*, 19 F.3d 215, 217 (5th Cir.1994) ("We review the district court's legal decisions, including the proper interpretation of a statute, *de novo*."). Consequently, we hold that because the disputed issue in this case is purely legal, it was appropriately resolved through summary judgment.[6]

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[6]In support of her argument that the existence of genuine issues of material fact should have precluded the district court from rendering summary judgment, Neff cites *Drexel v. Union Prescription Centers, Inc.*, 582 F.2d 781 (3d Cir. 1978). In *Drexel*, the Third Circuit applied the Rule 56(c) summary judgment standard to an issue of state agency law that involved an interpretation of a franchise agreement. A wrongful death plaintiff contended that the franchisor exercised sufficient control over the franchisee retail store such that it "operated" the store, thus rendering the franchisor potentially liable for the torts of its franchisee. The court treated the question of whether the franchise agreement created an agency relationship as one of fact and interpreted the agreement in the light most favorable to the nonmovant. *See id.* at 788-89. Although the court's reasoning is not entirely clear, the court did hold that the franchise agreement was ambiguous, *id.* at 788, raising the factual issue of what the parties intended it to mean, *id.* In any event, to the extent that *Drexel* is inconsistent with our holding in this case, we decline to follow its reasoning.

Neff also cites two state cases in support of her argument that

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[2] Neff's appeal thus presents a narrowly defined issue of first impression: whether a franchisor with limited control over a franchisee's store "operates a place of public accommodation" within the meaning of section 302(a).[7] Section 302(a) provides in pertinent part that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of ... [the] facilities ... or accommodations of any place of public accommodation *by any person who owns, leases (or leases to),*[8] *or operates a place of public accommodation.*" (emphasis added). Because the ADA does not define the term "operates," we "construe it in accord with its ordinary and natural meaning." *Smith v. United States,* —— U.S. ——, 113 S.Ct.2050, 2054, 124 L.Ed.2d 138 (1993); *see also Perrin v. United States,* 444 U.S. 37, 42, 100 S.Ct.311, 314, 62 L.Ed.2d 199 (1979) ("A fundamental canon of statutory construction is that unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.") To "operate," in the context of a business operation, means "to put or keep in operation," *The Random House College*

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material facts precluded summary judgment: *Singleton v. International Dairy Queen, Inc.*, 332 A.2d 160 (Del.Super.Ct.1975), and *American Dairy Queen Corp. V. Taxation & Revenue Department,* 93 N.M. 743, 605 P.2d 251 (Ct.App.1979). Neither case relates to ADA liability or applies the federal standard for summary judgment, however, and we decline to follow them.

[7]The parties do not dispute that the San Antonio Stores are places of public accommodation.

[8]The parties agree that ADQ does not own the premises in question or lease them to R&S Dairy Queens.

Dictionary 931 (Rev. ed. 1980), "[t]o control or direct the functioning of," *Webster's II: New Riverside University Dictionary* 823 (1988), "[t]o conduct the affairs of; manage," *The American Heritage Dictionary* 1268 (3d ed. 1992).

[3] Neff argues that the terms of the Nacogdoches Store Franchise Agreement demonstrate that ADQ exercises sufficient control over the San Antonio Stores to bring ADQ within the scope of section 302. We hold that the relevant inquiry in a case such as this one is whether ADQ specifically controls the modification of the franchises to improve their accessibility to the disabled. *Cf. Carparts Distribution Center, Inc. V. Automotive Wholesalers' Ass'n*, 37 F.3d 12, 16-18 (1st Cir.1994) (interpreting "employer" as used in Title I of ADA by looking to defendant's control over allegedly discriminatory denial of employee benefits). Although we have found no circuit court of appeals case law interpreting the scope of "operates" as used in § 302 of the ADA, the existing district court authority is consistent with our approach. All three district courts that have addressed the question of ADQ's liability for allegedly discriminatory conditions at franchisee stores have concluded that ADQ does not "operate" the stores for the purposes of § 302, and all three looked to ADQ's authority over structural modifications to the franchisee stores in reaching their conclusions. *See Young v. American Dairy Queen, Inc.*, 1994 WL 761233, *2 (N.D.Tex.1994); *Neff. American Dairy Queen, Inc.*, 879 F.Supp. 57, 60 (W.D.Tex.1994);

Alonzo v. Bayside Restaurant Co., C.A. No. C-94-103, slip op. at 4 (S.D.Tex.1994).[9]

[4] Neff and the United States point to numerous non-structural aspects of the San Antonio Stores' operations that they contend ADQ controls, such as accounting, personnel uniforms, use of trademarks, etc. While ADQ's control over these aspects may be relevant in other contexts, we hold that because it does not relate to the allegedly discriminatory conditions at the San Antonio Stores, it does not bear on the question of whether ADQ "operates") the franchises for the purposes of the ADA's prohibition on discrimination in public accommodations. Instead, the relevant question in this case is whether ADQ, according to the terms of its franchise agreements with R & S Dairy Queens, controls modification of the San Antonio Stores to cause them to comply with the ADA.

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[9]In addition two district courts have interpreted "operates" in the context of hospital operations consistently with our approach to the question in the context of franchise store operations. In *Howe v. Hull*, 873 F.Supp. 72 (N.D.Ohio 1994), the court held that a physician "operated" a hospital because he exercised sole discretion over the allegedly discriminatory decision not to admit a patient with AIDS. The court specifically focused on the physician's authority over the allegedly discriminatory act. *Id.* At 77-78. In *Aikins v. St. Helena Hosp.*, 843 F.Supp. 1329 (N.D.Cal. 1994), the court held that a physician who worked at a hospital as an independent contractor did not "operate" the hospital in question. The plaintiff in *Aikins*, the deaf wife of an emergency room patient, complained that the hospital had discriminated against her by failing to provide her with an interpreter. The court held that the physician defendant did not "operate" the hospital because, as an independent contractor, he exercised no authority over the hospital's policy on the use of interpreters. *Id.*at 1335.

Neff points to the following language in the Nacogdoches Store franchise agreement to support her position that ADQ controls the San Antonio stores:[10]

B. Company makes available to its licensees a system to establish, equip and operate a retail store facility as part of the "Dairy Queen" system using distinctive, uniform and approved designs, equipment, supplies . . . which Licensee desires to adopt and use to operate a "Dairy Queen" retail store in accordance with this Agreement and the system standards and requirements established and periodically revised by the Company...

5.1 The retail Store shall be constructed and equipped in accordance with Company's approved specifications and standards in effect at the time pertaining to design and layout of the building, and as to equipment, inventory, signage, fixtures, location and design and accessory features. Licensee shall not commence construction of the Store until he has received the written consent of Company to his building plans.

5.2 Any replacement, reconstruction, addition or modification in building, interior or exterior decor or image, equipment or signage, to be made after Company's consent is granted for initial plans, whether at the request of Licensee or of Company, shall be made in accordance with written

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[10]Neff has not identified, either below or on appeal, any language in the Perrin Beitel Store franchise agreement to support her claim that ADQ "operates" the Perrin Beitel Store. The Perrin Beitel Store franchise agreement is more limited in scope than the Nacogdoches Store agreement, and it contains none of the provisions to which Neff points in support of her argument regarding ADQ's control over the Nacogdoches Store.

specifications which have received the prior written consent of Company, which shall not be unreasonably withheld.

5.3 The building, equipment and signage employed in the conduct of Licensee's business shall be maintained in accordance with requirements established periodically by Company, or reasonable, specific lists prepared by Company based upon periodic inspections of the premises by Company's representatives. Within a period of ninety (90) days after the receipt of any particular maintenance list, Licensee shall effect the items of maintenance designated therein including the repair of defective items and/or the replacement of unrepairable or obsolete items of equipment and signage. Routine maintenance shall be conducted in accordance with general schedules published by Company.

6.7 Licensee shall adopt and use as his continuing operational routine the standard "Dairy Queen" management system, as prescribed in the Store Management Operations Manual, including Company's standards with respect to product preparation, merchandising, employee training, equipment and facility maintenance and sanitation. Company will revise the Manual and these programs periodically to meet changing conditions of retail operation in the best interest of "Dairy Queen" retail stores....

Record an Appeal, vol. 1, at 183-86. However, we agree with the district court that this language does not establish sufficient control an ADQ's part such that ADQ can be said to "operate" the San Antonio stores. Paragraph B is simply a general statement regarding the purpose of the agreement, and even it makes clear that R & S Dairy Queen, not ADQ, will "operate" the store. Paragraph 5.1 provides for the greatest level of control over the accessibility of the Nacogdoches Store to the disabled, but it relates to the

construction of the store, and it is undisputed that the Nacogdoches store was constructed and equipped before the ADA was enacted. Consequently, even if ADQ "operated" the store with respect to its construction, such operation is irrelevant because the issue in Neff's case is whether ADQ "operates" the San Antonio Stores with respect to the removal of existing architectural barriers. In addition, ADQ's pre-ADA control over the San Antonio Stores cannot form the basis of Neff's discrimination claim because the ADA is not to be given retroactive effect. *See Burfield v. Brown, Moore & Flint, Inc.*, 51 F.3d 583, 588 (5th Cir.1995) (holding that employment discrimination claim was barred because "[t]he ADA is not retroactive and it does not apply to actions allegedly taken prior to the effective date of the Act").

Paragraph 5.2, the only paragraph that relates to modifications to the structure of the Nacogdoches Store, simply provides that ADQ may disapprove any proposed modifications to the Nacogdoches Store building and equipment. While this does amount to a limited form of control over structural modifications, we agree with the district court that this right, which is essentially negative in character, cannot support a holding that ADQ "operates" the Nacogdoches Store with respect to its removal of architectural barriers to the disabled. We note that Neff has not alleged or offered any summary judgment evidence to show that ADQ has withheld its consent to proposed modifications to the Nacogdoches Store designed to bring it into compliance with the ADA.

In its brief, Neff specifically emphasizes paragraphs 5.3 and 6.7. Paragraph 5.3 refers to building and equipment maintenance and not the modification of the store structure or removal of architectural barriers. ADQ's control in this regard, while more relevant than its control over employee uniforms, accounting standards, etc., is not directly relevant to the Neff's suit. Neff's complaint is not based an R & S's failure to perform maintenance on the Nacogdoches Store building or equipment; rather, she complains of the equipment itself. Further, while Paragraph 5.3 does provide that such maintenance must be conducted in accordance with ADQ-established maintenance lists, Neff has not alleged, or offered any summary judgment evidence to show, that these lists prevent R & S from modifying the Nacogdoches Store to bring it into compliance with the ADA.

Paragraph 6.7 states that R & S must adhere to the routine prescribed by ADQ's "Store Management Operations Manual," through which ADQ sets standards for product preparation, merchandising, employee training, equipment and facility maintenance and sanitation." The effect of this provision is similar in kind to the effect of Paragraph 5.3. It does not relate to the modification of the physical structure or accessibility of the Nacogdoches Store, and Neff has not alleged or offered summary judgment to show that the Store Management Operations Manual prevents R & S Dairy Queens from making such modifications.[11]

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[11]At oral argument, Neff also pointed to paragraphs 11.1 and 11.2 of the agreement, which allow ADQ to terminate the agreement in case of breach. The right to terminate, however, does not grant ADQ additional control over the modification of the Nacogdoches Store to increase its accessibility to the

In sum, while the terms of the Nacogdoches Store franchise agreement demonstrate that ADQ retains the right to set standards for building and equipment maintenance and to "veto" proposed structural changes, we hold that this supervisory authority, without more, is insufficient to support a holding that ADQ "operates," in the ordinary and natural meaning of that term, the Nacogdoches Store.[12]

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disabled beyond ADQ's underlying contractual rights with respect to such modifications.

[12]We note that a recent Second Circuit case may suggest a disagreement with our reasoning. In *Staron v. McDonald's Corp.*, 51 F.3d 353 (2d Cir.1995), the court addressed the question of whether a ban on smoking was a "reasonable accommodation" required by the ADA. *See* 42 U.S.C. § 12182(b)(A)(ii). In that case, the plaintiffs sued McDonald's Corporation and Burger King Corporation alleging that the two corporations' policies of permitting smoking in "their" restaurants violated the ADA. The plaintiffs sought an injunction requiring the defendants to "establish a policy of prohibitng smoking in all of the facilities they own, lease or operate." *Staron*, 51 F.3d at 355. In its opinion, the Second Circuit alludes to an earlier disposition of a motion by McDonald's Corporation:

> On the same day that the district court granted the motions to dismiss, McDonald's announced a new policy prohibiting smoking in all of its corporate owned-and-operated restaurants. The smoking ban did not extend to its franchised restaurants. McDonald's then submitted a motion to this court to dismiss plaintiffs' appeal as moot. This court denied the motion on June 21, 1994.

Id. However, the court did not state on what grounds McDonald's policy change did not render the case moot, and the court's opinion contains no further discussion regarding the propriety of holding McDonald's responsible for the smoking policy at the franchisee restaurants.

Because Neff rested her claim that ADQ "operates" the San Antonio stores exclusively on the terms of the Nacogdoches Store franchise agreement, and did not allege that ADQ has prevented R & S Dairy Queens from complying with the ADA, either as a practical matter or by exercising its rights under its franchise agreements,[13] we hold that ADQ met its burden under Rule 56(c) in its motion for summary judgment. ADQ established the absence of a genuine issue of material fact and further that it was entitled to judgment as a matter of law based on the terms of its franchise agreements with R & S Dairy Queens. Because Neff offered no summary judgment evidence other than the Nacogdoches Store franchise agreement in response to ADQ's motion, we further hold that Neff's summary judgment evidence was insufficient to raise a genuine issue for trial.

Neff and the United States argue that to exclude ADQ from the scope of section 302(a) would be inconsistent with the canon of construction requiring courts to interpret civil rights statutes liberally to effectuate their remedial purposes. *See, e.g., Gates v. Collier,* 616 F.2d 1268,1275 (5th Cir.1980) (liberally interpreting Civil Rights Attorneys' Fee Awards Act), rehearing granted in part on other grounds, 636 F.2d 942 (5th Cir. 1981); *United States v. DeRosier,* 473 F.2d 749, 751(5th Cir.1973) (liberally interpreting Civil Rights Act of 1964). Even assuming the

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[13]As we noted above, Neff does not contend that ADQ has prevented R & S Dairy Queens from removing architectural barriers by refusing to approve modifications to the restaurants or promulgating a policy preventing such modifications. Indeed, ADQ offered numerous exhibits documenting its efforts to encourage franchisees to comply with the ADA.

canon applies in this context, we hold that Neff's interpretation of the term "operates" would require more than just a liberal construction of that term. Neff's argument in this case would require us to bend "operates" too far beyond its natural meaning for us to rely on the canon of statutory interpretation requiring that we interpret civil rights legislation liberally.[14]

Furthermore, we fail to see how our interpretation of "operates" to exclude ADQ under the circumstances involved in this case will interfere with the remedial purposes of the ADA. Assuming conditions at the San Antonio stores do not comply with the ADA, it is Neff's decision not to sue the owner and operator of those stores, R & S Dairy Queens, that will prevent her from obtaining the injunction she seeks.[15]

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[14]*Cf. EEOC v. AIC Security Investigations, Ltd.*, 55 F.3d 1276, 1281-82 (7th Cir.1995) ("We do not doubt that the employment discrimination statutes have broad remedial purposes and should be interpreted liberally, but that cannot trump the narrow, focused conclusion we draw from the structure and logic of the statute. A liberal construction does not mean one that flies in the face of the structure of the statute.").

[15]Because Neff seeks only injunctive relief, it is curious why Neff elected to name ADQ rather than R & S Dairy Queens, the more logical defendant to an ADA suit over the accessibility of the San Antonio Stores. However, the answer may lie in §§ 302(b)(2)(A)(iv) and 301(9)(C) of the ADA, 42 U.S.C. §§12182(b)(2)(A)(iv), 12181(9)(C). Section 302(b)(2)(A)(iv) defines discrimination in public accommodations to include "a failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities, ... where such removal is readily achievable." 42 U.S.C. § 12182(b)(2)(A)(iv). Section 301(9)(C), in turn, defines "readily achievable" as follows"

> The term "readily achievable" means easily accomplishable and able to be carried out without much difficulty or expense. In determining

[51 Neff also argues that because "a franchisor is held responsible under the Civil Rights Act, a franchisor is held responsible under the ADA." This argument fails on several levels. First, it depends on Neff's premise that "the Title III [of the ADA] rights and remedies are the same as those rights and remedies available under the Civil Rights Act of 1964." However, the statutory provision Neff cites for this proposition states only that the *remedies* available under the ADA shall be the same as the *remedies* available under the Civil Rights Act. *See* 42 U.S.C. § 12188(a)(1). Second, because the Civil Rights Act does not define the scope of defendants who may potentially be liable with reference to who "operates" a public accommodation, Civil Rights Act cases are unlikely to be informative on the meaning of that term. Third, the two cases on which Neff relies to argue that franchisors "are liable" under the Civil Rights Act, *Wheeler v. Hurdman*, 825 F.2d 257(10th Cir.1987), *cert. denied*, 484 U.S. 986, 108 S.Ct. 503, 98

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whether an action is readily achievable, factors to be considered include---

(B) the overall financial resources of the covered entity ...

42 U.S.C. § 12181(9)(C). Consequently, the scope of the injunctive relief available to Neff if she proves a violation of the ADA will depend in part on the financial strength of the defendant against which she proceeds.

Still, while our holding excluding ADQ from the scope of §302 with respect to the San Antonio Stores may limit the actual relief available to Neff, it will not hurt her ability to compel R & S Dairy Queens to make "readily available" structural changes to the San Antonio stores.

L.Ed.2d 501(1987), and *Bradley v. Pizzaco*, 7 F.3d 795 (8th Cir.1993), are factually distinguishable.[16]

III

For the foregoing reasons, we AFFIRM the district court's order granting ADQ's motion for summary judgment.

Still, while our holding excluding ADO from the scope of § 302 with respect to the San Antonio Stores may limit the actual relief available to Neff, it will not hurt her ability to compel R & S Dairy Queens to make "readily available" structural changes to the San Antonio stores.

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[16]In *Wheeler*, the Tenth Circuit held that a general partner was not an "employee: within the meaning of Title VII, the ADEA, and the Equal Pay Act. *id.* at 277 ("For the reasons stated above, we hold that bona fide general partners are not employees under the Anti-Discrimination Acts."). The only issue before the court in *Bradley* was whether the defendants had established a business justification defense for enforcing an allegedly discriminatory "no beard" policy. One of the defendants was a franchisor, Domino's Pizza, Inc., but the court did not address the basis for Domino's liability under Title VII. However, the court's recitation of the facts demonstrates that the allegedly discriminatory "no beard" policy was
"established nationwide by [the] franchisor, Domino's Pizza, Inc.," *id.* at 796, and thus was a direct result of an affirmative act by the franchisor.

AGREEMENT made on the 1st, of September, 1986, between AMERICAN DAIRY QUEEN CORPORATION. a Delaware corporation)herein called "Company"), and R&S Dairy Queens, Inc. Of the city of San Antonio. County of Bexar and State of Texas (herein called "Licensee").

This Agreement is premised upon the following facts:

A. Company and its predecessors instituted, developed, promoted and established: the "Dairy Queen" trademark, service mark and trade name, which is registered in the United States Patent and Trademark Office, in the several states and in foreign countries, which Company owns together with the trademarks enumerated in the attached Appendix A (herein collectively called the "Trademarks"); and the "Dairy Queen" and "Brazier" franchise business and system for the sale of certain dairy and food products, beverages and other goods and services under the Trademarks, utilizing therein distinctive facilities, equipment, supplies, ingredients, formulas, business techniques and sales promotion programs developed and revised periodically by Company; and,

B. Company makes available to its licensees a system to establish, equip and operate a retail store facility as part of the "Dairy Queen" system using distinctive, uniform and approved designs, equipment, supplies, ingredients, business methods and sales promotion programs, and uniform methods for the use and protection of the Trademarks which I [unreadable] desires to adopt and use to operate. "Dairy Queen" retail store as a member of the "Dairy Queen" system in accordance with this Agreement and the system standards and requirements established and periodically revised by Company, in order to offer to the public goods and services of uniformly high quality, to protect the interests of Licensee, Company and other system members and to produce and sell goods that consistently conform to system standards and the highest expectations of consumers:

NOW THEREFORE, IN CONSIDERATION of the foregoing and of the mutual covenants and considerations set forth herein including the license granted by Company and the fees paid by Licensee, the parties hereby agree as follows:

GRANT OF LICENSE

Company's Grant to Licensee, Location.

1. Company hereby grants to Licensee the right and license to:

1.1 Establish and operate a retail store identified as a "Dairy Queen" store (herein called the "Store") at 13122 Nacogdoches San Antonio, Texas (herein called the "Authorized Location"); provided, however, that if an Authorized Location is not designated on the date of this Agreement and is not designated herein by Company within ninety (90) days after such date, unless such period is extended in writing by Company, this Agreement shall become null and void and all deposits including the service and set-up fee less Company's actual expenses in connection with Licensee shall be returned to Licensee.

Trademark Usage.

1.2 Use the Trademarks at the Authorized Location on, and in association with (I) production, packaging and sale of uniform and approved products and services designated periodically by Company, (ii) related sales promotion programs and materials approved periodically by Company, and (iii) uniform equipment, fixtures, supplies and ingredients approved periodically

by Company for use in the storage, preparation, packaging and sale of such products.

Business Method.

1.3 Employ at the Store the business system, methods and sales promotion developed, approved and revised periodically by Company.

ACCEPTANCE OF LICENSE

Acceptance by Licensee.

2. Licensee accepts the above license from Company and agrees that Licensee shall cause a "Dairy Queen" store to be established within 180 days of the date hereof (unless an extension of time is authorized in writing by Company), and thereafter maintained and operated at the Authorized Location, under Licensee's active supervision and management and upon the standards and requirements hereinafter provided. Licensee further expressly acknowledges and agrees:

Trademark Ownership.

2.1 The Trademarks are valuable property owned by Company, and Company is the exclusive owner of all right, title and interest in and to the Trademarks and all past, present or future goodwill of the Store, and of the business conducted at eh Authorized Location, which is associated with or attributable to the Trademarks. Licensee disclaims all interest in or to such goodwill and the Trademarks and acknowledges and agrees that such goodwill and the Trademarks are the exclusive property of Company and that he will not challenge or

contest such ownership, or Company's registration of the Trademarks.

Trademark Use.

2.2 Licensee shall use or permit the use of the Trademarks only in such form and manner, and only in connection with such products and services, as may be approved or designated periodically by Company. Licensee shall use the Trademarks only at the Authorized Location or in approved sales promotion programs employed in connection with operation of the Store. Licensee shall not sublicense the use of the Trademarks. Licensee shall not sell or offer for sale any product identified by any of the Trademarks except at the Authorized Location, without the prior written consent of Company.

Store Identification.

2.3 Licensee shall prominently identify the Store with one or more of the Trademarks specified by Company, and with no other name or mark. Licensee shall not use any other name of mark at the Authorized Location or in the Store without Company's prior written consent, and shall not use any of the Trademarks as part of Licensee's business or corporate name.

Business Method.

2.4 Licensee shall adopt and follow in good faith the system, programs and methods prescribed by Company for Licensee's retail operation in accordance with this Operating Agreement.

Compliance with Law.

2.5 Licensee shall at all times maintain his business premises and conduct his business operations in compliance with all applicable laws, regulations, codes and ordinances. In particular, Licensee acknowledges that he is an independent entrepreneur, solely responsible for control and management of his business, including, but not limited to, such matters as determining the prices at which Licensee will offer and sell approved products, hiring and discharging Licensee's employees and setting and paying wages and benefits of his employees: and that Company shall have no power, responsibility or liability in respect to such pricing, hiring, setting and paying of wages or related matters.

Conflict of Interest.

2.6 Neither Licensee nor any person owning an interest directly or indirectly in Licensee shall directly or indirectly, without the prior written consent of Company, operate or permit to be operated or hold any interest (other than 1% or less of the outstanding stock or debt of any class of any public company) in any restaurant of fast-food business other than one authorized by this Agreement or other Operating Agreements issued by Company.

TERM

Term.

3. The license granted herein shall continue until terminated by Licensee, with or without cause, on sixty (60) days prior written notice to Company, or until

otherwise terminated by either Licensee or Company, in accordance with the provisions of this Agreement.

TRADEMARK STANDARDS AND REQUIREMENTS

General Declaration.

4. Licensee agrees that nothing herein gives him any title to or interest in the Trademarks except the qualified right [unreadable] conditions of this Agreement and that Licensee's use thereof [unreadable] to the benefit of Company. Specifically, but without limiting the foregoing. Licensee acknowledges and agrees that Company has the right and may distribute for its own account products identified by the Trademarks through not only "Dairy Queen" retail stores but through any other distribution method which may periodically be established.

Uniform Use of Trademarks.

4.1 Licensee shall conduct his "Dairy Queen" business in accordance with Company's system standards and requirements pertaining to Trademark usage, product quality and production, facility and equipment cleanliness, maintenance and appearance, service standards, method of operation and sales promotion. Licensee shall use the Trademarks only in association with products and services approved by Company and which meet Company's standards or requirements with respect to quality, mode and condition of storage, production and sale, portions and packaging. Licensee shall implement and abide by Company's requirements and recommendations directed to enhancing substantial system

uniformity in the matters described in this paragraph.

Equipment and Supplies.

4.2 Licensee agrees to purchase and use, in the operation of the Store, only equipment, supplies, ingredients and services that are approved by Company. Nothing herein shall be construed as an attempt to limit unreasonably the sources from which Licensee may procure facilities, equipment, supplies, ingredients or services. Rather, it is the intention of the parties that such items conform to Company's standards and specifications of consistent quality and uniformity. Nothing contained herein shall be deemed to require Company to appoint an inordinate number of manufacturers of a given item or surveyors of a given service which in the reasonable judgment of Company would result in higher cost generally to Company's licensees or prevent effective and economical supervision of such manufacturers or surveyors by Company. Requests for appointment of additional manufacturers of items of surveyors of services shall be in writing and shall contain such information as Company may reasonably request. Company reserves the right to charge back to Licensee or the proposed manufacturer or surveyor all reasonable expenses incurred in considering requests for appointment. Licensee may obtain approved products or services from any available source of supply.

Approved Adaptations.

4.3 Complete and detailed uniformity under many varying conditions may not always be possible or practical and Company reserves the right and privilege, at Company's sole discretion and as Company may deem in its best interest in any specific instance, to vary standards for any other licensee based upon the peculiarities of a particular site or location, density of population, business potential, population of trade area, existing business practices, or any condition which Company deems to be importance to the operation of such licensee's business. Licensee shall not be entitled to require Company to grant to Licensee a like or other variation hereunder on account of any variation from standard specifications and practices granted to any other licensee. Licensee acknowledges that he is aware that other licensees of Company operate under a number of different forms of agreement and that, consequently, the obligations and rights of the parties to such other agreements may differ materially in certain instances. Licensee acknowledges and agrees that any requirement, standard or specification prescribed by Company under this Operating Agreement is subject to periodic modification or rescission by Company as may be necessary in Company's reasonable judgment to adapt the "Dairy Queen" system to changing conditions and competitive circumstances.

Litigation.

4.4 In the event any person who is not a licensee or franchisee of Company uses or infringes the

Trademarks. Company shall control all litigation and shall be the sole judge as to whether or not suite shall be instituted, prosecuted or settled, the terms of settlement, and whether or not any other action is taken. Licensee shall promptly notify Company of any such use or infringement of which he becomes aware.

Notice of Potential Company Profit.

4.5 Company hereby advises Licensee that Company and/or its affiliates may from time to time make available to Licensee goods, products and/or services for use in Licensee's Store on the sale of which Company and/or its affiliates may make a profit. Company further advises Licensee that it and/or its affiliates may from time to time receive consideration from suppliers and/or manufacturers in respect to sales of goods, products or services to Licensee, or in consideration of services rendered or rights licenses to such person. Licensee agrees that Company and/or its affiliates shall be entitle to said profits and/or consideration.

FACILITY STANDARDS AND MAINTENANCE

Store Facility.

5. The following provisions and conditions shall control with respect to Licensee's Authorized Location and Store:

5.1 The retail Store shall be constructed and equipped in accordance with Company's approved specifications and standards in effect at the time pertaining to design and layout of the

building, and as to equipment, inventory, signage, fixtures, location and design and accessory features. Licensee shall not commence construction of the Store until it has received the written consent of Company to his building plans. Licensee is solely responsible for obtaining all necessary permits, licenses and/or architectural seals, and in all other respects [unreadable] with applicable legal requirements relating to the building, signs and [unreadable].

Alteration.

5.2 Any replacement, reconstruction, addition or modification in building, interior or exterior decor or image, equipment or signage, to be made after the Company's consent is granted for initial plans, whether at the request of the Licensee or of the Company, shall be made in accordance with written specifications which have received the prior written consent of the Company, which shall not be unreasonably withheld.

Maintenance.

5.3 The building, equipment and signage employed in the conduct of Licensee's business shall be maintained in accordance with requirements established periodically by Company, or reasonable, specific lists prepared by Company based upon periodic inspections of the premises by Company's representatives. Within a period of ninety (90) days after the receipt of any particular maintenance list, Licensee shall effect the items of maintenance designated therein including the repair of defective items and/or the

replacement of unrepairable or obsolete items of equipment and signage. Routine maintenance shall be conducted in accordance with general schedules published by Company.

Relocation.

5.4 Should it become necessary, on account of condemnation, sale or other cause, including expiration or cancellation of lease, to relocate the Store. Company shall grant Licensee authority to do so at a site, acceptable to Company, that is within a radius of 1.000 meters of the Authorized Location, is reasonable for a "Dairy Queen" retail store, does not infringe on rights on another licensee, is reasonably distant form other "Dairy Queen" retail stores equipped and fully ready to be opened for business within one year after discontinuing operation of a "Dairy Queen" Store at the Authorized Location, all in accordance with the current standards of Company Licensee's right to relocate the Store is attributable to the voluntary act or omission of Licensee. Licensee's right to relocate the Store as provided herein shall be void and Licensee's interest in this Agreement shall be abandoned unless Licensee shall have given Company notice of his intent to relocate not less than sixty (60) days prior to closing the Store, shall have procured a site acceptable to Company within 60 days after closing the prior Store, and shall have opened the new retail store for business within 180 days of such closure.

Modernization or Replacement at Time of Transfer.

5.5 Each and every transfer of any interest in this Agreement or business conducted hereunder governed by Paragraph 10 is expressly conditioned upon Licensee promptly effecting such items of modernization, refurnishing and/or replacement of building, equipment and signage as may be reasonable necessary to permit the same to conform to the standards them prescribed by Company for similarly situated new "Dairy Queen" store operations. Licensee acknowledges and agrees that the requirements of this Paragraph 5.5 are both reasonable and necessary to insure continued public acceptance and patronage of the "Dairy Queen" system and to avoid deterioration or obsolescence in connection with the operation of the business.

PRODUCTS AND OPERATIONS STANDARDS AND REQUIREMENTS

Authorized Product Line.

6. The following provisions shall control with respect to products and operations:

6.1 Licensee's business hereunder shall be confined to preparation and sale of only such products as from time to time are designated and approved by Company for sale by licensees who are parties to this form of Operating Agreement. Licensee shall offer for sale from the Store the complete "approved menu" designated periodically by Company. The current approved menu is attached as Appendix B. Company periodically may make reasonable modifications to be approved menu. In addition, Licensee

periodically may request variation from the currently approved menu, which shall only be make with the prior written consent of Company. The premises upon which said business is operated shall not be used for any other business and there shall not be sold or offered for sale there from any other product or service without the written consent of Company. Specifically, but without limiting the foregoing, alcoholic or intoxicating beverages or controlled substances shall not be sold or offered for sale or otherwise handled upon said premises.

Authorized Ingredients, Formulas, Supplies, Preparation.

6.2 Licensee shall use in preparing products only such ingredients, formulas and supplies as a specified by Company and in such portions, sizes, appearance and package as set forth in Company's most current "Store Management Operations Manual" and "product preparation charts." Copies of the current "Store Management Operations Manual" and "product preparation charts" will be supplied to Licensee by Company prior to opening of Licensee's Store. Licensee acknowledges and agrees that these may be changed periodically by Company and that Licensee is obligated to conform to the requirements as so changed. All other supplies, including cones, cups, containers, eating utensils, napkins and all other customer service materials of all descriptions and types shall meet the reasonable standards of uniformity and quality as now or hereafter are set by Company.

Licensee shall be furnished with lists of approved supplies, ingredients and services.

Serving and Promotional Items.

6.3 All Sales promotion material, customer goodwill items, cartons, containers, wrappers and paper goods, eating and serving utensils, customer convenience items (including napkins, baby bibs and disposal containers) used in the sales promotion, sale and distribution of all products covered by this Operating Agreement shall, where practicable, contain one or more of the Trademarks and indicate that it is produced and sold under the authority of Company and shall be subject to approval by Company before being used.

Health and Sanitation.

6.4 Licensee's business shall be operated and maintained at all times in compliance with any and all applicable health and sanitary standards prescribed by Company and by governmental authority. In addition to complying with such standards, if the Store shall be subject to any sanitary or health inspection by any governmental authorities under which it may be rated in one or more than one classification, it shall be maintained and operated both so as to be rated in the highest available health and sanitary classification with respect to each governmental agency inspecting the same, and in addition so as to comply with any higher standards that Company may prescribe.

Inspection.

6.5 Company or its authorized representative shall have the right to enter Licensee's Store at all reasonable times during the business day for the purposes of making periodic inspections and to ascertain if all the provisions of this Operating Agreement are being observed by Licensee and to inspect Licensee's Store, land and equipment, and to test, sample and inspect his supplies, ingredients and products, as well as the storage, preparation and formulation thereof and the conditions of sanitation and cleanliness in the storage production, handling and serving thereof.

Period of Operation.

6.6 Licensee's Store shall be opened to the public and operated at least twelve hours each day of the year. Any variance from this provision must be authorized in writing by Company. Acts of God strikes or riots preventing Licensee temporarily from complying with the foregoing shall suspend compliance therewith for the duration of such interference.

Operating Procedures.

6.7 Licensee shall adopt and use as his continuing operational routine the standard "Dairy Queen" management system as prescribed in the Store Management Operations Manual including Company's standards with respect to product preparation, merchandising, employee training, equipment and facility maintenance and sanitation. Company will revise the Manual and these programs periodically to meet changing

conditions of retail operation In the best interest of "Dairy Queen" retail stores. During and after the term of this Agreement, Licensee shall keep the Manual and Product Preparation Charts and their respective contents strictly confidential and in particular shall not duplicate or disseminate any such information to any third party other than Licensee's employees.

PERSONNEL AND SUPERVISION STANDARDS

Training.

7. The following provisions and conditions shall control with respect to personnel, training and supervision:

7.1 Licensee shall at Licensee's expense attend and successfully complete Company's store management training program at a place to be designated by Company prior to the opening of Licensee's Store. In the event Licensee fails to complete such training to the reasonable satisfaction of Company. Company may within thirty (30) days thereafter declare this Agreement null and void, whereupon all deposits including the service and set-up fee less Company's expenses in connection with Licensee shall be returned to Licensee. If Licensee desires to operate the Store with a manager other than himself. Licensee shall at Licensee's expense cause such person to attend and successfully complete such training program before undertaking such operations. Under no circumstances shall Licensee permit management of the Store's operations on a regular basis by a person who has not

successfully completed Company's store management training program.

Staffing.

7.2 Licensee shall hire and supervise efficient, competent, sober and courteous persons as his employees for the operation of the business and set and pay their wages, commissions and incentives with no liability therefor on Company. Licensee shall require all his employees to work in clean uniforms approved by the Company, but furnished at the cost of Licensee or the employees as Licensee may determine.

Internal Training Program.

7.3 Company shall make available for purchase by Licensee an in-store training program for all store employees. Licensee shall train and periodically retrain all store employees using the training aids make available by Company. Company periodically will revise such training materials and aids and make the same available for purchase by Licensee.

Attendance at Meetings.

7.4 Licensee, or manager of Licensee at Licensee's expense shall attend at least one national or regional meeting each year which Company originates for "Dairy Queen" operators to set forth new methods and programs in store operation, training, management, sales and sales promotion programs. Company further strongly recommends that key employees of Licensee also attend such meetings.

SALES PROMOTION PROGRAMS

Sales Promotion Programs and Payment to Company of Administration Expenses.

8.1—Company and Licensee, together with all licensees of Company shall cooperate in sales promotion programs. To this end Company reserves the right periodically to establish, organize and prescribe sales promotion programs and Licensee agrees to pay to Company a sales promotion program fee as set Forth in Paragraph 9.1. Licensee acknowledges and agrees that Company has had in the past and shall in the future have, the discretion to determine expenditures of funds collected in respect to sales promotion programs and as to the selection of the promotional materials and programs for which said expenditures are made provided, however, that Company shall make a good faith effort to expend such funds in the general best interest of the "Dairy Queen" system. Licensee acknowledges and agrees that Company may compensate itself and/or its affiliated companies for the expense of administering and promoting such sales promotion programs. Licensee further acknowledges and agrees that he will pay the sales promotion program fees provided herein not with standing the payment by other licensees of Company of lesser or no sales promotion program fees. Company shall annually advise Licensee of the receipts and expenditures of the funds collected in respect to said sales promotion programs and of Company's expense

of administering and promoting said sales promotion programs.

Approved Materials.

8.2 Licensee shall use only such sales promotion program or other advertising materials as are furnished approved or made available by or through Company. Said materials shall be used only in a manner prescribed by Company. Company shall not unreasonable withhold approval of any sales promotion materials. Licensee shall use any point of sale posters or other promotional material that is copyrighted by Company or that depicts any of the Trademarks or approved menu items only in connection with Licensee's sale of approved menu items at Licensee's "Dairy Queen" Licensee shall not at any time transfer such materials to any third party, other than a "Dairy Queen" licensee authorized to sell the products depicted in such materials, without Company's prior written consent.

Yellow Pages.

8.3 Licensee shall, if requested by Company list separately, or participate in a listing in the Yellow Pages of his local telephone directory containing such copy as may reasonable be specified by Company. The cost of such listing shall be paid by Licensee or by Licensee and other participating licensees in the case of a joint listing. Company shall not specify an unreasonably expensive listing.

FEES, REPORTING AND FINANCIAL MANAGEMENT

Service and Set-Up, License and Sales Promotion Program Fees.

9.1 (I) Licensee shall pay to Company as a service and set-up fee $N/A of which $N/A has been paid upon the date of execution of this Agreement; and a balance of $N/A is payable in accordance with the terms of Appendix C attached hereto. Said service and set-up fee is intended to compensate Company for expenses incurred and services rendered in assisting in establishing and opening Licensee's initial operation of the Store.

(ii) In addition to said service and set-up fee, during the full term of this Operating Agreement and in consideration of the rights licensed hereunder. Licensee shall pay to Company as licensee fee in respect of the rights licensed herein a sum equal to 4% of gross retail sales exclusive of retail sales taxes of all products, goods and wares of every king and nature sold from, or in connection with the operation of Licensee's "Dairy Queen" retail Store, including, but without limiting the generality of the foregoing sales of all products under any of the Trademarks as well as sales of other merchandise whether or not identified by other brand names.

(iii) In addition, Licensee shall pay to Company a sales promotion fee to be expended in accordance with promotion fee shall be a sum equal to not less than 3% not more than 5% of Licensee's gross retail sales net of sales taxes.

Company shall determine and notify Licensee of the exact percentage prior to the first day of each fiscal year of Company except for any year for which the percentage is to be unchanged from the proceeding year. Such percentage shall be the same as that to be employed during such succeeding year by the majority of Company's direct licensees within the marketing area (as determined by Company) within which Licensee's store is located.

Computations and Remittances.

9.2 All amounts dues and owing hereunder shall be computed at the end of each month's operation and remittance for the same shall be made to Company on or before the tenth day of the following month accompanied by the reports required by Paragraph 9.5 hereof. The computation of said amounts shall be certified and sworn to by Licensee in the manner and form specified by Company and Licensee shall supply to Company such supporting or supplementary materials as Company may reasonable require to verify the accuracy of such remittances.

Surcharge Method of Precollection.

9.3 At Company's option. Company may require Licensee to pay at the time of purchase to supplier of mix meat and/or other products and ingredients used in the conduct of the business of the Store, a surcharge on all units of such commodities purchased by Licensee. Said surcharge shall be established by Company at a reasonable rate so as to approximate the amount

of license fee and sales promotion fee which will be payable by Licensee. Said surcharge shall be paid to said supplier or suppliers for the account of Company, and be regarded by the parties as a method of precollection of said license and sales promotion fees. The amounts so collected shall be credited by Company against the license and sales promotion fees due from Licensee to Company at the end of each month's operations. Company shall submit to Licensee on Company's choice of a monthly or quarterly basis a reconciliation of Licensee's license and sales promotion fees account setting forth the credits to Licensee's account from amounts collected for Company by suppliers through the aforesaid surcharge method. Should Licensee fail to submit reports in accordance with Paragraph 9.5. Company may make said reconciliation in conformance with its best judgment as to amounts due and Company's reconciliation shall be conclusive as to the amount due Company from Licensee unless within a period of ten (10) days after mailing of said reconciliation to Licensee by Company. Licensee provides evidence in a form satisfactory to Company of the correct amounts due. Licensee shall pay within ten (10) days after mailing of notice to Licensee by Company such amounts if any determined to be owed pursuant to Company's reconciliation. If Company determines that Licensee has overpaid license or sales promotion fees on the surcharge basis. Company shall remit to Licensee an amount equal to the excess fees collected at the

time the monthly or quarterly reconciliation is provided Licensee.

Financial Planning and Management.

9.4 Licensee agrees to employ sound financial management and planning practices in connection with his "Dairy Queen" Store and shall keep such books and records as Company may periodically require including but not limited to a monthly profit plan, monthly balance sheet and monthly statement of profit and loss records of prices and special sales, check registers and purchase records, sales summaries, and inventories, which accurately reflect the operations and condiiton of Licensee's business operated hereunder. Books, records and reports shall be compiled, kept and filed with Company on such forms and using such methods of bookkeeping and accounting as Company may periodically prescribe. Licensee shall record daily all sales on a cash register tape or similar device and preserve the same for not less than twenty-four (24) months.

Reports and Audit.

9.5 Within ten (10) days after the end of each month, Licensee shall file a report with Company in such form and content as Company may periodically prescribe. The report shall include, but not be limited to, the following information for the month: (I) amount of gross sales of the Store amount of retail sales tax thereon, gross sales subject to license fee and the computation of the license fee; (ii) total volume of mix, weight of meat and as specified

periodically by Company, quantities of other commodities purchased, and the sources from which each were obtained; (iii) copies of Licensee's most recent sales tax return, monthly sales summary, profit plan, balance sheet and statement of profit and loss including a summary of Licensee's costs for utilities, labor, rent and other material cost items. Company or its authorized representative shall have the right at all times during the business day to enter the premises where Licensee's costs for utilities, labor, rent and other material cost items. Company or its authorized representative shall have the right at all time during the business day to enter the premises where Licensee's books and records relative to said Store are kept, and to inspect, copy and audit such books and records. In the event that nay such inspection or audit reveals an understatement of licensee's gross sales, continuing license fees or sales promotion fees of 2-1/2% or more, or a variance of 5% or more from data reported to Company in respect to any other material item, in addition to any other rights it may have, Company may conduct such further periodic audits and/or inspections of Licensee's books and records as Company reasonable deems necessary for up to two years thereafter and such further audits and/or inspections shall be at Licensee's sole expense including without limitation professional fees, travel and room and board expenses directly related thereto.

[Unreadable]

9.6 [Unreadable] the equipment of suppliers used in connection with Licensee's business, and ; of every kind and character created or placed or against any of said property and all accounts other indebtedness of every kind incurred by Licensee in the conduct of said business. In the event Licensee should default in making any such payment. Company shall be authorized but not required to pay the same on Licensee's behalf and Licensee covenants promptly to reimburse Company on demand for any such payment. Any and all amounts owing to Company by Licensee hereunder whether the same arise under the provisions of this Paragraph 9.6 or under any other provision of this Agreement (except deferred portions of the initial service and set-up fee, which are governed by the terms of Appendix C). shall bear interest at the rate of 18% per annum. Of the maximum contract rate of interest permitted by governing law, whichever is less from and after the date of accrual thereof.

Liability and Insurance.

9.7 Licensee hereby waives all claims against Company for damages to property or injuries to persons arising out of the operation of Licensee's business, and Licensee shall indemnify and save Company and its affiliates harmless of and from any such damage or injury through the negligence of any party or otherwise arising from or in connection with the operations of said business or the consumption of the product thereof. Licensee further agrees

to purchase and maintain in full force and effect at Licensee's sole expense liability insurance in an aggregate amount designated periodically by Company for Licensees who are party to this form of Operating Agreement as may be necessary to reflect inflation, risk levels or other factors deemed important by Company, but not less than $300.000 per person and $500.000 per event, insuring both parties hereto by name from liability for any and all such damage or injury. Licensee further agrees to deliver to Company periodically or at Company's request a proper certificate evidencing the existence of such insurance coverage and Licensee's compliance with the provisions of this paragraph which names Company as an additional insured thereunder and which provides that Company will be given thirty (30) days prior written notice of termination or cancellation of the policy. Said insurance coverage shall commence as of the date Licensee commences operating a "Dairy Queen" retail store will be operated, whichever shall first occur.

Offsets.

9.8 Licensee waives any and all existing and future claims and offsets against any amounts due hereunder, which amounts shall be paid when due. Company shall be entitled to apply or cause to be applied against amounts due to Company or any of its affiliated companies any amounts which may from time to time be held by Company or its affiliates on Licensee's behalf or be owed to Licensee by Company or its affiliates.

TRANSFER OR FRANCHISE

Transfer Requirements.

10.1 This Agreement is entered into by Company in specific reliance upon the personal experience, skills and managerial and financial qualifications of Licensee as being essential to the satisfactory operation of the business licensed hereunder. Consequently, Licensee's interest in this Agreement and/or in the business conducted hereunder shall not be transferred or assigned to or assumed by any other person or entity (the "assignee"), in whole or in part, by sale, lease, management agreement, gift or otherwise, including involuntarily or by operation of law, or at the election of a receiver or trustee in bankruptcy, unless Licensee shall have first tendered to Company the right of first refusal to acquire such interest in accordance with Paragraph 10.7, and if Company fails to exercise such right, only with the prior written consent of Company and upon payment of the transfer fee provided for herein. Company's consent shall not be reasonably withheld, provided the proposed assignment or transfer be of all of Licensee's interest herein together with substantially all of the business operated pursuant to this Agreement and that the proposed assignee is in Company's reasonable judgment qualified to provide active supervision over the operation of the business operated hereunder in compliance with the requirements of this Agreement, and possesses sufficient net worth and sources of capital which meet Company's standards for the business

conducted hereunder. In the event of Licensee's insolvency or the filing of any petition by or against Licensee under any provisions of any bankruptcy or insolvency law, should Licensee's legal representative, successor, receiver or trustee desire to succeed to Licensee's interest in this Agreement or the business conducted hereunder, such person shall first so notify Company, pay the transfer fee and apply for Company's consent thereto as in the case of any other proposed transfer of the franchise granted by this Agreement. Application for Company's consent to a transfer, and tender of the right of first refusal provided for in Paragraph 10.7, shall be made by submission of Company's form of application for consent to transfer, which shall be accompanied by the documents (including a copy of the proposed purchase or other transfer agreement) or other information required therein. The application shall indicate whether Licensee proposes to retain a security interest in the property to be transferred. No such security interest shall be created without Company's prior written consent. Licensee agrees to cause any person who directly or indirectly hold or acquires any 5% or greater interest in this Agreement or in the business conducted hereunder to execute this Agreement or the guaranty at the foot of this Agreement as a Licensee or owner of record.

Transfer Fee.

10.2 Together with the application for consent to the transfer of Licensee shall pay to Company as a transfer fee the sum of One Thousand Eight Hundred Dollars ($1,800), or an amount equal to one-half of the license fees paid or payable to Company in respect of the last twelve (12) months of the Store's active operations, whichever is the greater amount as a fee for the evaluation of the proposed assignee, providing opening or startup assistance to assignee, furnishing one copy of the Store Management Operations Manual, and for any and all other expenses incurred and services rendered by Company in effecting said transfer. If Company declines to give its consent to a proposed transfer (and does not exercise its right for first refusal) it shall return to Licensee the transfer fee, less any actual expenditures or disbursements made by Company in direct connection with evaluating or processing the proposed transfer together with an itemized statement of any such costs for which Company reimburses itself from the transfer fee. The transfer fee is not refundable in whole or in part under any circumstances except as expressly stated in this Agreement.

Conditions of Transfer.

10.3 As a condition to Company's consent to any proposed transfer of this Agreement to a corporation or any other entity all shareholders or owners of the corporation or entity shall execute the undertaking and guaranty at the foot of this Agreement and Licensee shall cause any

persons who subsequently become shareholders or owners also to execute said undertaking and guaranty. In all cases, Company may condition its consent to any proposed transfer upon the following: (i) all amounts owed by Licensee to Company or its affiliates or Licensee's suppliers or upon which Company or its affiliates has any contingent liability shall be paid in full and all reports due to Company shall be filed; (ii) Licensee shall first complete such reasonable refurbishing, modernization, repair or renovation of the Store and Authorized Location or its fixtures, furnishings, signage or grounds as Company may designate to bring such Store into reasonable conformity with then-current system standards; and (iii) at Company's request Licensee shall furnish both assignee and Company with a break-even projection for the store which demonstrates on the basis of reliable data that assignee may reasonable expect to operate the Store profitably taking into account the agreed purchase price for equivalent debt Company has the right to confer with assignee and furnish assignee with information concerning the Store and proposed transfer without liability to Licensee except for intentional made to assignee.

Training.

10.4 In the vent of any transfer, the assignee, as a condition of Company's consent to the transfer, must prior to taking over operation of the Store attend and to the reasonable satisfaction of

Company complete, at assignee's expense. Company's training program.

Transfer of Stock.

10.5 In the event Licensee is a corporation, partnership or other entity, any transfer or transfers of stock (or other form of ownership interest) constituting in the aggregate a controlling interest in Licensee or the business conducted hereunder shall be subject to the consent right of first refusal, transfer fee and all other applicable provisions of this Agreement. Any individual transfer of any 5% or great interest but less than a controlling interest in Licensee or the business conducted hereunder shall be reported immediately to Company in such form and content as Company may reasonable requests.

Death or Disability.

10.6 In the event of the death, disability or incapacity of any individual Licensee or principal officer or director of an incorporated Licensee or partner in a partnership Licensee should the decedent's heir or successor in interest, or the corporation or partnership, as the case may be wish to continue as Licensee hereunder such person shall apply for Company's consent thereto, successfully complete Company's training program and pay the applicable transfer fee, in accordance with this Paragraph 10 as in any other case of proposed transfer of Licensee's interest in this Agreement.

Right of First Refusal.

10.7 If Licensee proposes to transfer or assign this Agreement or Licensee's interest herein or in the business conducted hereunder, in whole or in part, to any third party (other tan a corporation all of whose stock of other securities are owned by Licensee's said interest as provided herein. In the vent of a bona fide offer from such third party. Licensee shall obtain from the third-party offeror and deliver to Company a statement in writing, signed by the offeror, of the terms of the offer. In the event of Licensee's insolvency or the filing of any petition by or against Licensee under any provisions of any bankruptcy or insolvency law, an amount and terms of purchase shall be established by an appraiser chosen by the bankruptcy court or by the chief judge of the federal district court of franchisee's district and Licensee or Licensee's legal representative shall deliver to Company. If Company fails to accept the offer within the thirty-day period, Licensee shall be free for sixty days after such period to effect the disposition described In the statement delivered to Company; but Licensee shall effect no other sale or assignment of this Agreement or the business conducted hereunder without first offered in the same to Company in accordance with this paragraph 10.7

CONTRACT VIOLATION

Remedies Arbitration.

11. Except as qualified below and in Paragraph 12.2 any dispute between the parties hereto arising under, out of

in connection with or in relation to this Agreement, which the parties are unable to resolve, shall be submitted in binding arbitration in accordance with the Rules and Procedures and under the suspices of the American Arbitration Association. The arbitration shall take place at the capital of the state of the Authorized Location of Licensee or at such other replace as may be mutually agreeable to the parties. The decision of the arbitrators shall be final and binding on all parties. Notwithstanding the foregoing. Licensee recognized that his "Dairy Queen" Store is one of a large number of stores similarly situated and selling to the public similar products, and hence the failure on the part of a single licensee to comply with the terms of his Operating Agreement could cause irreparable damage to Company, the "Dairy Queen" system and/or to some or all other "Dairy Queen" licensees. Therefore, it is mutually agreed that in the event of a breach or threatened breach of any of the terms of this Operating Agreement by Licensee. Company shall forthwith be entitled to an injunction restraining such breach and/or to a decree of specific performance, without showing or proving any actual damage, until such time as a final and binding determination is made by the arbitrators. The foregoing equitable remedy shall be in addition to, and not in lieu of all other remedies or rights which Company might otherwise have by virtue of any breach of this Agreement by Licensee. Company also reserves the right to commence a civil action against Licensee or take other appropriate action to collect sums of money due to Company to compel Licensee to compile and submit required reports to Company or to permit inspections or audits authorized by this Agreement. The prevailing party in any action or proceeding hereunder

shall be entitled to recover its reasonable attorney's fee and costs therein.

Breach of Contract.

11.1 License shall be in default hereunder is Company determines that Licensee has breached any of the terms of this Operating Agreement, which without limiting the generality of the foregoing shall include making any false report to Company, failure to submit any required report failure to pay when due any amounts required to be paid to Company or any of Company's affiliates whether pursuant to this Operating Agreement of otherwise or to any third party as required by this Operating Agreement, conviction of Licensee of any felony or misdemeanor which brings or tends to bring the Trademarks or the "Dairy Queen" system into disrepute or impairs or tends to impair the goodwill of the Trademarks failure to abide by "Dairy Queen" systems standards and requirements in connection with the operation of Licensee's business or failure to meet any requirements or specifications established by Company with respect to product quality physical property, conditions of equipment or materials used products manufactured, menu, or use of approved products, packages, or promotional materials. Failure of Licensee to pay to Company any past due amount owed within seven (7) days of Company's written notice of default therein [unreadable] business operated hereunder.

Termination by Company.

11.2 Except as hereinafter provided failure of Licensee to cure a default by Licensee hereunder within seven (7) days from the date of a written notice default mailed or delivered to Licensee, which notice states such default, shall give Company good cause to terminate this Agreement; provided, that Licensee shall have no right to cure any default which is the third similar default within any continuous twelve (12) month period, and Company shall have good cause to terminate this Agreement in any such case. Termination shall be accomplished by mailing or delivering to Licensee written notice of termination, which notice shall state the grounds therefore and shall be effective (I) immediately in any case of voluntary abandonment of this Agreement by Licensee or conviction of Licensee of any offense directly related to the business conducted hereunder, or (ii) sixty (60) days after the date of such notice of termination in all other cases; provided, however, that notwithstanding any other term of this Paragraph 11, this Agreement may be terminated immediately upon failure of Licensee to cure within twenty-four (24) hours of notice thereof any default under this Agreement which materially impairs the goodwill associated with any of the Trademarks. In addition to the foregoing, this Agreement may be terminated by Company upon any other ground or by any short period of notice (but not less than seven days except as provided above) as may be permitted from time to time by applicable law or regulation. The provisions of any applicable law

or regulation prescribing permissible grounds, or minimum periods of notice, for termination of this franchise shall supersede any provision of this Agreement that is less favorable to Licensee than such law or regulation.

Land or Building Lease, or Failure to Reopen.

11.3 Subject t other provisions of Paragraph 5.4 hereof, any termination of the land or building lease for Licensee's store, or failure to repair and reopen for operation Licensee's destroyed or damaged store within one year of the date of occurrence of such destruction nor damage, shall be construed as Licensee's voluntary abandonment of this franchise and Agreement.

Termination by Licensee.

11.4 Licensee shall not be entitled to terminate this Agreement for cause unless he shall have given Company written notice of the grounds for such termination and Company shall have failed to cure such grounds to the reasonable satisfaction of Licensee within thirty (30) days of Company's receipt of such notice. As a condition to Licensee or his successor termination this Agreement without cause at any time prior to the tenth anniversary of Licensee's first opening to the Store for business. Licensee shall pay to Company an amount equal to two time the license fees payable to Company in respect to (I) the last twelve months of the Store's active operations, or (ii) the entire period the Store has been open for business, whichever is the shorter period.

TERMINATION RIGHTS AND CONSEQUENCES

Reversion of Rights: Discontinuation of Trademarks Use.

12. Upon the termination of this Operating Agreement:

12.1 All rights of Licensee to the used of the Trademarks and all other rights and licenses granted herein, and the right and license to conduct the "Dairy Queen" business at the Authorized Location, shall revert to Company without further act or deed of any party. All right, title and interest of Licensee in, to and under this Operating Agreement shall become the property of Company. Licensee shall immediately cease all use and display of the Trademarks and of any material copyrighted by Company and of all or any portion of point of sale materials furnished or approved by Company, and shall pay ll sums due to Company or its affiliates or whose payment by Licensee Company or its affiliate has guaranteed. Licensee shall immediately return to Company all copies of the Store Management Operations Manual and Product Preparation Charts then in his possession or control or previously disseminated to his employees. Licensee shall promptly and in any event within twenty (20) days, at his own expense, remove or obliterate all store signage, displays or (subject to Paragraph 12.2) other materials in his possession at the Authorized Location or elsewhere that bear any of the trademarks or names or material confusingly similar t other Trademarks and so alter the appearance of the retail store facility including removal or substantial modification of its distinctive roof as

to differentiate the retail store facility unmistakable from duty licensed "Dairy Queen" retail stores.

Purchase Option.

12.2 Company shall have the unqualified right to purchase any or all equipment, fixtures, furnishing or supplies, of whatever kind, owned by Licensee and used by him in the production of the "Dairy Queen" product, or any of the other approved products under any of the Trademarks hereunder, at a price determined by a qualified appraiser selected with the consent of both parties. If the parties cannot agree upon the selection of such an appraiser one shall be appointed by the American Arbitration Association upon petition of either party to appoint an appraiser to establish such price in accordance with the rules and procedures of the Association. Said option to purchase may be exercised by Company at any time within thirty (30) days from the date of such termination or within thirty (30) days after the date of the receipt by Company of the appraiser's determination whichever shall be the later date. Company's interest hereunder in said property shall constitute a lien thereon, and shall not be impaired or terminated by the sale or other transfer of any such equipment of supplies by Licensee to a third party. Upon the exercise of such option and lender of payment for any such equipment or supplies, Licensee agrees to sell and deliver the same to Company free and clear of all encumbrances, and to execute and deliver to Company a bill of sale therefor.

Non-Compete; Claims.

12.3 Neither Licensee nor any principal of an incorporated Licensee shall directly or indirectly engage in any competitive business within 2.000 meters of the Authorized Location that existed immediately prior to termination for a period of one year after the date of termination by either party with or without cause. Licensee shall not assert any claim or cause of action against Company after one year following the effective date of termination of this Agreement.

GENERAL PROVISIONS

Void or Unenforceable Clauses.

13.1 Should one or more clauses of this Agreement be held notwithstanding Paragraph 13.9, to be void or unenforceable for any reason by any court of competent jurisdiction, such clause or clauses shall be deemed to be separable in such jurisdiction and the remainder of this Agreement shall be deemed to be valid and in full force and effect and the terms of this Agreement shall be equitable adjusted so as to compensate the appropriate party for any consideration lost because of the elimination of such clause or clauses. It is the intent and expectation of each of the parties that each provision of this Agreement will be honored, carried out and enforced as written. Consequently, each of the parties agrees that any provision of this Agreement sought to be enforced in any proceeding hereunder shall, at the election of the party seeking enforcement and notwithstanding the availability of an adequate remedy at law, be

enforced by specific performance, or any other equitable remedy.

Waiver by Company.

13.2 Any waiver by Company of any breach by Licensee shall not be deemed to be a waiver of any other or subsequent beach nor an estoppel to enforce its rights in respect of any other or subsequent breach. This Agreement shall not be waived, altered or rescinded, in whole or in part, except by a writing signed by Licensee or an officer of Company as the case may be. This Agreement, and application form executed by Licensee requesting Company to enter into this Agreement, constitute the sole agreement between the parties with respect to the entire subject matter of this Agreement and embody all prior agreements and negotiations with respect to the "Dairy Queen" business. There are no representatives of any kind except as contained herein and in the aforesaid application.

Notices.

13.3 Except as otherwise provided in this Agreement, any notice, demand or communication provided for herein shall be in writing, signed by the party serving the same, and either delivered personally or deposited in the United States mail, postage prepaid, and if such notice is a notice of default or of termination, by registered or certified mail, and:

a. If intended for Company, shall be addressed to American Diary Queen Corporation at 5701 Green Valley Drive, Minneapolis, Minnesota 55439;

b. If intended for Licensee, shall be addressed to Licensee at the Authorized Location hereinabove designated; or, in either case, to such other address as may have been designated by notice to the other party. Notices for purposes of this Agreement shall be deemed to have been received if mailed as provided in this paragraph, or if personally delivered.

Required Signature, Company.

13.4 This Agreement, as well as any consent, approval, authorization or waiver granted hereunder shall be valid only if in a writing executed on behalf of Company by its President or one of its Vice Presidents.

Joint Liability, Licensee.

13.5 If Licensee consists of two or more individuals, such individuals shall be jointly and severally liable and references to Licensee in this Agreement shall include all such individuals. Reference to Licensee as male shall also include a female licensee, partnership or corporation or any other business entity as relevant in the context. Headings and captions contained herein are for convenience of reference only and shall not be taken into account n construing or interpreting this Agreement.

Shareholder Guarantee, Licensee.

13.6 If this Agreement is to be issued or transferred to a corporation, partnership or other entity, in addition to complying with the applicable requirements of Paragraph 10, all shareholders

or other owners of such entity shall execute the form of guaranty at the foot of this Agreement, and any person who thereafter acquires hor holds any 5% or greater interest in Licensee, this Agreement or the business conducted hereunder shall also execute this Agreement or such guaranty.

Benefit, others.

13.7 Subject to the terms of Paragraph 10 hereof, this Agreement shall be binding upon and inure to the benefit of the administrators, executors, heirs, successors and assigns of the parties.

Applicable State Law.

13.8 This Agreement shall be deemed made when accepted by the Company at is office in Minneapolis, Minnesota, and shall be governed by and interpreted in accordance with the law of the State of Minnesota.

Future Amendments.

13.9 This Agreement shall be deemed to be amended from time to time as may be necessary to bring any of its provisions into conformity with valid conformity with valid applicable laws or regulations.

Supreme Court, U.S.
FILED
NOV 17 1995
OFFICE OF THE CLERK

No. 95-636

In the
Supreme Court of the United States
October Term, 1995

MARGO NEFF, For Herself and
Those Similarly Situated,

Petitioner,

vs.

AMERICAN DAIRY QUEEN CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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1995 – Bachman Legal Printing ■ (612) 339-9518 ■ FAX (612) 337-8053

30 pp

QUESTION PRESENTED

Whether the Court of Appeals for the Fifth Circuit erred in affirming summary judgment on the basis that American Dairy Queen Corporation is not the "operator" of the two Dairy Queen ® stores in question for purposes of Title III of the Americans with Disabilities Act.

PARTIES

The parties in this case are:

Petitioner: Margo Neff

Respondent: American Dairy Queen Corporation

American Dairy Queen Corporation's affiliates include its parent corporation, International Dairy Queen, Inc., a Delaware corporation. American Dairy Queen Corporation is a wholly-owned subsidiary of International Dairy Queen, Inc. American Dairy Queen Corporation's affiliates also include the following International Dairy Queen, Inc. subsidiaries:

Orange Julius of America, a California corporation;

Karmelkorn Shoppes, Inc., a Delaware corporation;

Golden Skillet, Inc., a Delaware corporation;

DQF, Inc., a Minnesota corporation;

Firstaff, Inc., a Minnesota corporation;

Dairy Queen Canada, Inc., a federal Canadian corporation; and

Orange Julius Canada Limited, a federal Canadian corporation.

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No. 95-636

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

MARGO NEFF, For Herself and
Those Similarly Situated,

Petitioner,

-vs.-

AMERICAN DAIRY QUEEN
CORPORATION

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent American Dairy Queen Corporation ("ADQ") respectfully requests that this Court deny Petitioner's request for a writ of certiorari to the Fifth Circuit Court of Appeals in this action. There are no compelling reasons for this Court to

grant Petitioner's request for writ of certiorari. The Fifth Circuit properly affirmed the District Court's grant of summary judgment holding that, as a matter of law, the provisions of the franchise agreement alone could not form the basis for a finding that ADQ was an "operator" of the two franchised Dairy Queen® restaurants at issue in this case for the purposes of the Americans with Disabilities Act's ("ADA" or "the Act") prohibition on discrimination in public accommodations. Moreover, the Fifth Circuit's decision does not conflict with any decisions of other United States Courts of Appeal or any decisions of this Court. Accordingly, this Court should deny Petitioner's request for writ of certiorari to the Fifth Circuit Court of Appeals.

OPINIONS BELOW

The opinion of the District Court for the Western District of Texas granting ADQ's motion for summary judgment in this matter is reported at 879 F. Supp. 57 (W.D. Tex. 1994), and reprinted in the Appendix of Petitioner's Brief, (A-1 - A-10). The opinion of the Fifth Circuit Court of Appeals affirming the district court's grant of summary judgment in favor of ADQ is reported at 58 F.3d 1063 (5th Cir. 1995), and reprinted in the Appendix of Petitioner's Brief, (A-11 - A-30).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant portions of section 302 of the Americans With Disabilities Act:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of

any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12182(a).

For the purposes of subsection (a) of this section, discrimination includes -

> (iv) a failure to remove architectural barriers, and communication barriers that are structural in nature . . . where such removal is readily achievable[.]

42 U.S.C. § 12182(b)(2)(A)(iv).

Relevant portions of section 301 of the Americans with Disabilities Act:

The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce -

* * *

> (B) a restaurant, bar, or other establishment serving food or drink[.]

42 U.S.C. § 12181(7)(B).

STATEMENT OF THE CASE

I. Course Of Proceedings Below.

On February 24, 1994, Petitioner Margo Neff ('Neff'), through Advocacy Incorporated, commenced this action against ADQ in the District Court of Bexar County, Texas, alleging that ADQ had violated the Americans With Disabilities Act. Neff alleged that ADQ violated the Act because it failed to remove architectural barriers in order to allow disabled individuals access to Dairy Queen® store buildings located at 13122 Nacogdoches and 9726 Perrin Beitel in San Antonio, Texas (the 'San Antonio Stores'). Inexplicably, Neff failed to name R & S Dairy Queens, Inc., the franchisee owner and operator of the San Antonio Stores, as a defendant in this lawsuit. Neff's Complaint sought declaratory and injunctive relief under Title III of the Act, 42 U.S.C. 12101 et seq.

ADQ subsequently removed this action to the United States District Court for the Western District of Texas, San Antonio Division. Upon removal, this action was assigned to the Honorable Edward C. Prado, United States District Court Judge. Contrary to Neff's assertions, this case is not a "class action", nor does it involve any issues relating to "state-wide relief at all Dairy Queen® restaurants in Texas."[1]

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[1] Neff unsuccessfully attempted to broaden the scope of this lawsuit beyond the two San Antonio Stores at issue on several occasions. On May 2, 1994, Neff filed a motion for class certification. On June 3, 1994, Neff filed an amended motion for class certification and a motion for leave to file an amended complaint. Judge Prado denied these motions as moot when he granted ADQ's summary judgment motion. Neff did not appeal the denial of either of these motions.

On June 14, 1994, ADQ filed a motion for summary judgment.[2] On July 14, 1994, Judge Prado granted ADQ's motion and entered final judgment dismissing Neff's claims against ADQ. Judge Prado held that the terms of the Nacogdoches franchise agreement were insufficient to make ADQ an "operator" for purposes of Title III of the Americans with Disabilities Act.[3] Specifically, Judge Prado held that merely possessing a veto power over proposed building plans and modifications does not constitute "operating" a public accommodation for purposes of the Americans with Disabilities Act. 879 F. Supp. at 60.

On August 12, 1994, Neff appealed the District Court's judgment to the Fifth Circuit Court of Appeals (the "Fifth

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[2] Neff now disingenuously claims insufficient opportunity to conduct discovery in the case before summary judgment. However, Neff raised this issue neither in the District Court, nor on appeal to the Fifth Circuit. Moreover, the record demonstrates that Neff had sufficient time to conduct discovery. ADQ moved for summary judgment more than three months after Neff filed the case. Neff also misrepresents the significance of Judge Prado's denial of ADQ's motion to dismiss. On April 14, 1994, ADQ filed a motion to dismiss to put Neff on notice that ADQ was not a proper defendant in this action. ADQ did not submit a brief or affidavits in this initial procedural response, anticipating that the substantive issue would ultimately be determined by summary judgment. When Neff challenged ADQ's motion to dismiss, which was on file but not scheduled for hearing, Judge Prado denied ADQ's motion because of the absence of supporting affidavits and arguments, stating, however, that "the court may reconsider these rulings or consider a motion for summary judgment" upon receipt of supporting authority. (See Order, reprinted in Respondent's Appendix, A-1, A-2.)

[3] Two other federal district courts that have addressed the question of ADQ's liability for allegedly discriminatory conditions at franchisee stores have also concluded that ADQ does not "operate" the stores. See Young v. American Dairy Queen, Inc., 1994 WL 761233 (N.D. Tex. 1994); Alonzo v. Bayside Restaurant Co., C.A. No. C-94-103, slip op. at 4 (S.D. Tex. 1994).

Circuit"). The Fifth Circuit affirmed the District Court's grant of summary judgment holding that ADQ had met its summary judgment burden under Rule 56(c) and had established the absence of a genuine issue of material fact. The Fifth Circuit further held that ADQ was entitled to judgment as a matter of law based on the terms of its franchise agreements with R & S Dairy Queens. Specifically, the Court found that, as a matter of law, the unambiguous terms of the Nacogdoches franchise agreement[4] were insufficient to support a holding that ADQ "operates," the San Antonio Stores in the ordinary and natural meaning of that term. 58 F.3d at 1068-69.

II. Statement Of Facts.

A. Margo Neff.

Margo Neff is an individual who has a physical disability that requires her to use a wheelchair to gain mobility. Neff commenced this action against ADQ alleging that the San Antonio Stores are not accessible to persons with disabilities in violation of Title III of the ADA. Neff complained that ADQ was responsible for removing alleged barriers to access because ADQ "conducts or owns" the San Antonio Stores.

B. American Dairy Queen Corporation.

ADQ is the owner of the federally registered Dairy Queen® trade name and various trademarks and service marks that are used in connection with the operation of licensed

[4] Neff never identified any language in the Perrin Beitel Store's franchise agreement to support her claim that ADQ "operates" the Perrin Beitel Store. The Perrin Beitel franchise agreement contains none of the provisions to which Neff points in support of her argument regarding ADQ's alleged control over the Nacogdoches Store.

Dairy Queen® stores.[5] (See Affidavit of Lon Brew, reprinted in Respondent's Appendix, A-3 - A-9.) ADQ is also the national and international franchisor of Dairy Queen® stores. (Id.)

ADQ enters into franchise agreements with individuals or entities (franchisees) under which ADQ, in exchange for certain fees, licenses franchisees to establish and operate retail businesses under the Dairy Queen® trade name, to use the Dairy Queen® Trademarks, and to use the Dairy Queen® business system, methods, and sales promotion programs in connection with their Dairy Queen® stores. (Id.) Through its franchise system and agreements, ADQ makes available to franchisees an opportunity to establish and operate independent retail stores as part of the Dairy Queen® system. (Id.)

ADQ has consistently taken steps to educate and aid its franchisees with respect to ADA compliance. Since passage of the ADA, ADQ has been active in educating franchisees about the requirements of the ADA and encouraging franchisees to take all actions that are necessary to ensure that their stores comply with those requirements. See 58 F.3d at 1069 n.13. ADQ also has held workshops and seminars for its franchisees concerning the compliance requirements as they relate to restaurants. Contrary to Neff's representations, this case is before this Court today not because ADQ has failed to fulfill its responsibilities, but because Neff and her counsel refuse to acknowledge that ADQ does not own, lease (or lease to), or operate its franchisee's store buildings in issue[6] and has neither the legal responsibility nor legal authority to make

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[5] Hereinafter, the phrase "Dairy Queen® Trademark" refers collectively to the "Dairy Queen®" trademark and ADQ's other trademarks and service marks.

[6] It is undisputed that ADQ neither owns nor leases either of the San Antonio Stores involved in this action. (A-8.)

physical changes to those store buildings. This case is also before the Court because Neff failed to pursue her claims against the party responsible for compliance, ADQ's franchisee, the true owner and operator of the store buildings. Indeed, if the store buildings are truly not in ADA compliance, there is no reason to believe that Neff could not have obtained compliance had she proceeded against the proper party.[7]

C. R & S Dairy Queens, Inc. And The San Antonio Stores.

The San Antonio Stores are independently owned and operated by R & S Dairy Queens, Inc. ("R & S"), a Texas corporation. It is undisputed that R & S, a franchisee of ADQ, is a separate and distinct entity from ADQ. (A-8.) It is also undisputed that R & S and ADQ have no common ownership, employees, or management and have no centralized control of labor operations. (Id.) R & S independently owns and operates the San Antonio Stores. (Id.) R & S also owns the buildings and premises from which those stores are operated.[8] (Id.) ADQ has no ownership interest in either building and does not lease either building. (Id.) Each of the San Antonio Stores is governed by a separate franchise agreement. (A-5 - A-7.)

---

[7] In Alonzo v. Bayside Restaurant Co., supra, Advocacy Incorporated, Neff's counsel, did join the franchisee and successfully negotiated a settlement without ADQ's involvement.

[8] It is also undisputed that the San Antonio Stores' buildings were constructed before passage of the ADA, and that ADQ neither built, designed, provided designs or plans for, nor otherwise participated in the construction of the San Antonio Stores' buildings. (A-6, A-7.)

REASONS FOR DENYING THE WRIT

I. The Fifth Circuit Properly Held That The Issue Of Whether ADQ Is An "Operator" Of The San Antonio Stores Is A Question Of Law In The Instant Action.

Neff contends that the District Court and the Fifth Circuit Court of Appeals ("the Lower Courts") improperly "weighed the evidence" when granting ADQ's motion for summary judgment. Neff, however, misrepresents the Lower Courts' analyses, as well as the applicable summary judgment standard.

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment:

> [S]hall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). Numerous decisions have reiterated this standard. See, e.g., Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986).

The Lower Courts properly applied this standard to the question of whether ADQ operates the San Antonio Stores for purposes of the ADA. Neff submitted no evidence to the District Court upon which reasonable minds could return a verdict in her favor, but relied solely upon the unambiguous language of the Nacogdoches franchise agreement to support her claim that ADQ "operated" the San Antonio Stores. The

Fifth Circuit correctly held that the interpretation of an unambiguous contract is a question of law. 58 F.3d at 1065. The contract contained no indication that ADQ actually operated the San Antonio Stores, and the undisputed evidence in the record demonstrates that R & S, not ADQ, owns and operates the San Antonio Stores and is the only party legally capable of making physical changes to the San Antonio Stores' buildings.

Thus, contrary to Neff's assertions, there was no conflicting evidence to "weigh." The Lower Courts premised their analyses on undisputed facts -- the unambiguous language of the franchise agreement. The Lower Courts were not weighing factual evidence, but making a legal determination of whether a remote corporate franchisor could be deemed the "operator" of the stores solely on the basis of the undisputed evidence before them. The terms of the franchise agreement were undisputed and unambiguous. Also uncontroverted is the absence in the record of any summary judgment evidence, or even allegations, of ADQ's right to compel compliance modifications, or refusal to approve modifications to achieve compliance. Neff failed to adduce any evidence in response to ADQ's summary judgment motion or explain any inability to develop sworn summary judgment evidence in time for the hearing. Accordingly, the Lower Courts applied the proper summary judgment analysis in the instant case in holding that, as a matter of law, ADQ is not an operator of the San Antonio Stores.

II. The Fifth Circuit's Decision Does Not Conflict With Any Decisions Of Other United States Courts Of Appeal.

Neff erroneously asserts that the Fifth Circuit's decision conflicts with decisions from the Third, Eighth, and Tenth Circuit Courts of Appeals. In fact, cases cited by Neff involve

issues of vicarious liability and liability under the employment provisions of the Civil Rights Act, not the issue presently before the Court.

A. The Fifth Circuit's Decision Does Not Conflict With The Third Circuit's Decision In *Drexel.*

The Third Circuit's decision in Drexel v. Union Prescription Ctrs., Inc., 582 F.2d 781 (3rd Cir. 1978), creates no conflict with the decision in the instant case. Drexel, a wrongful death action, involved issues of alleged vicarious liability by a pharmaceutical franchisor for negligent prescription filling by its retail pharmacy. Id. The analysis in Drexel differs from the instant case in numerous respects.

First, Drexel did not involve the statutory interpretation of the term "operator" as it relates to franchisors or the ADA. Rather, Drexel dealt with classic master-servant principles of control or right to control under a tort analysis less dependent on the specific actions of the franchisor.

Second, Drexel was decided without any serious analysis of the requirements of the Lanham Act. The opinion mentioned the Act only in passing and reflected uncertainty about whether it actually required trademark owners to exercise controls over its licensees. See 582 F.2d at 786 n.5.

Third, Drexel cited ambiguities in the franchise agreement at issue and resulting questions over the extent to which the franchisor represented or "held out" the franchisee to the public as a direct employee or servant of the franchisor. No such issues are involved here. Significantly, Neff admits that the terms of the Nacogdoches franchise agreement are unambiguous. (See Petitioner's Brief, p. 11). Moreover, the instant case involved no allegations that ADQ held out its franchisee to the public as being a direct employee or servant of ADQ.

Fourth, contrary to Neff's assertions, the controls reserved by the franchisor in Drexel were far broader than those reserved by ADQ. In Drexel, the franchisor went so far as to require that the franchisee use union contractors and suppliers, and reserved the right to (i) order fixtures and equipment for the franchisee that franchisor believed were necessary, (ii) designate the nature and levels of inventory, and (iii) effect "a complete and effective transfer of the business" from the franchisee to the franchisor at the franchisor's option. 582 F.2d at 787-788.

B. The Fifth Circuit's Decision Does Not Conflict With Eighth And Tenth Circuit Decisions Concerning Civil Rights Act Remedies.

Neff incorrectly relies on Bradley v. Pizzaco of Nebraska, Inc., 7 F.3d 795 (8th Cir. 1993), and Wheeler v. Hurdman, 825 F.2d 257 (10th Cir. 1987), for the proposition that franchisors are responsible for violations of civil rights occurring at the premises of a franchisee. Neither case even addressed that issue. Instead, each turned on the existence or absence of an employer-employee relationship between the parties. Specifically, Bradley involved a corporate-wide "no beard" policy specifically established by the Domino's Pizza franchisor. The franchisor was, thus, a necessary party to the suit, and the Court did not even address the issue of whether the franchisor was liable for the acts of its franchisee. 7 F.3d at 796-97. It was the franchisor's policy, not that of the franchisee, that was under attack. Unlike Bradley, this case does not involve an ADQ-established policy alleged to violate applicable law.

Wheeler, involved no franchise issues whatsoever. Wheeler was an employment discrimination suit filed against an accounting firm. 825 F.2d at 260-62. The case was decided against the plaintiff on the basis that she was a

partner, not an employee, of the accounting firm and thus not covered under Title VII of the Civil Rights Act. In denying the plaintiff's attempt to broaden judicially the scope of Title VII beyond employees, the Court stated as follows:

> If Congress had intended the Acts to apply to the performance of all services, subject to stated exceptions, it would have said so. To suggest that Congress intended the provisions of Title VII, the ADEA, and the FLSA to reach all situations where discrimination may arise in a business setting is to suggest that it enacted these statutes with the intent that they cover all individuals having an economic relationship with a business. This would make employee status largely irrelevant and would essentially transform the employment discrimination statutes into business discrimination statutes.
>
> * * *
>
> The requirement that the statutes cover only employment situations suggests that Congress perceived a need to limit the application of these statutes.

Id. at 275-76.

Similarly, Congress carefully considered and scrutinized the issue of what specific entities should be covered under Title III of the ADA, and chose not to include franchisors among those entities. Neff's lawsuit is a misguided attempt to expand the breadth of the ADA's application beyond its plain language and the intent of Congress.

Finally, Neff's assertion that franchisors are routinely held liable for civil rights violations occurring on the premises of their franchisees is not correct. To the contrary, numerous courts have recognized that the mere establishment by a franchisor of uniform standards and specifications, which are essential to the functioning of a franchise system, does not subject the franchisor to liability under civil rights statutes for the acts of a franchisee. See, e.g., Evans v. McDonalds Corp., 936 F.2d 1087 (10th Cir. 1991); Kennedy v. McDonalds Corp., 610 F. Supp. 203 (D. W.Va. 1985).

CONCLUSION

Respondent ADQ respectfully requests that this Court deny Petitioner's request for a writ of certiorari to the Fifth Circuit Court of Appeals. There are no compelling reasons for this Court to grant Petitioner's request. The Fifth Circuit properly affirmed the District Court's grant of summary judgment holding that, as a matter of law, ADQ was not an "operator" of the two franchised Dairy Queen® restaurants at issue for the purposes of the ADA's prohibition on discrimination in public accommodations. Moreover, the Fifth Circuit's decision conflicts with no decisions of other United States Courts of Appeal, nor any decisions of this Court.

Respectfully submitted:

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Attorneys for Respondent

November 17, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MARGO NEFF, for Herself and those similarly situated,	)	
Plaintiff,	)	
VS.	)	CIVIL ACTION NO. SA-94-CA-280
AMERICAN DAIRY QUEEN, INC.,	)	
Defendant.	)	

ORDER DENYING MOTION TO DISMISS

On this date came on to be considered Defendant's Motion to Dismiss of American Dairy Queen Corporation, filed in the above-styled and numbered cause on April 1, 1994. After careful consideration of all the papers and pleadings on file, this Court is of the opinion that Defendant's motion should be denied.

Defendant's motion merely states without evidentiary support that Defendant does not own, operate or rent the subject premises. Defendant offers no argument or cite any authority why such unproved factual issues require dismissal for failure to state a claim. Defendant makes similar cursory allegations that Plaintiff does not meet the requirements of Rules 19 & 23 of the Federal Rules of Civil Procedure. While the Court may reconsider these rulings or consider a motion for summary judgment, the Court must receive a pleading

from Defendant that outlines the Defendant's arguments and the authority supporting Defendant's claims.[1]

Accordingly, it is hereby ORDERED that Defendant's Motion to Dismiss of American Dairy Queen Corporation is DENIED.

SIGNED and ENTERED this 6th day of May, 1994.

s/s
EDWARD C. PRADO
UNITED STATES DISTRICT JUDGE

[1] Curiously, Defendant's motion states that it includes a supporting memorandum brief. The Court could not find any supporting memorandum. Possibly Defendant merely neglected to file the supporting memorandum with its motion.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MARGO NEFF, for Herself and Those Similarly Situated,	)	
	)	Civil Action No.
Plaintiff,	)	SA-94-CA-280
	)	
vs.	)	**AFFIDAVIT OF**
	)	**LON BREW**
AMERICAN DAIRY QUEEN CORPORATION,	)	
	)	
Defendant.	)	

STATE OF TEXAS)
) SS:
COUNTY 0F DALLAS)

I, LON BREW, having been first duly sworn under oath, hereby state the following:

1. I am an individual over the age of 21 and, unless stated otherwise, I have personal knowledge as to each of the statements set forth below.

2. I am currently employed as Vice President - Franchise Operations with American Dairy Queen Corporation ("ADQ"). In my capacity as Vice President - Franchise Operations with ADQ, I am responsible for, among other things, providing assistance and services to Dairy Queen® stores in an area that includes the State of Texas.

3. I have been employed with ADQ in a variety of positions since 1981 and have held my current position since December 1990.

4. I presently work for ADQ out of its Dallas, Texas regional office and have worked out of that regional office since 1987.

5. In my capacity as Vice President - Franchise Operations with ADQ I am aware of the Dairy Queen® stores located at 13122 Nacogdoches and 9726 Perrin Beitel in San Antonio, Texas ("San Antonio Dairy Queen® Stores"), and have access to ADQ's files relative to the San Antonio Dairy Queen® Stores.

6. ADQ is the owner of the federally registered Dairy Queen® trade name and various trademarks and service marks that are used in connection with the operation of licensed Dairy Queen® stores.

7. ADQ is also the national and international franchisor of Dairy Queen® stores.

8. ADQ enters into franchise agreements with individuals or entities, known as franchisees, under which ADQ licenses the franchisees to establish and operate retail businesses under the Dairy Queen® trade name, to use ADQ's trademarks and service marks, and to use the Dairy Queen® business system, methods, and sales promotion programs in connection with their Dairy Queen® retail stores, in exchange for certain fees. Through its franchise system and franchise agreements, ADQ makes available to franchisees a system pursuant to which they can establish and operate retail stores as part of the Dairy Queen® system.

9. ADQ protects the Dairy Queen® trade name and its trademarks and service marks by, among other things, requiring franchisees to use distinctive and approved designs, equipment, supplies, ingredients, business methods, sales promotion programs, and other uniform methods and procedures to ensure the quality and uniformity of the products and services provided to consumers through licensed Dairy Queen® stores.

10. On July 1, 1975, ADQ's predecessor in Texas, Dairy Queens Products of Texas, entered into a written agreement with Dairy Queen Investments, Inc. entitled "DAIRY QUEEN FRANCHISE AND LICENSE AGREEMENT" ("1975 Franchise Agreement"). A true and correct copy of the 1975 Franchise Agreement is attached as Exhibit A.

11. Under the 1975 Franchise Agreement, Dairy Queen Investments, Inc. received a license to use the Dairy Queen® name and Dairy Queen® Trademarks, and to open a Dairy Queen® store in a territory defined in part as all area within one half mile radius of Nacogdoches at El Sentero in San Antonio, Texas.

12. ADQ believes that in 1975 or 1976, Dairy Queen Investments, Inc. constructed or had constructed the present Dairy Queen® store building located at 13122 Nacogdoches in San Antonio, Texas.

13. ADQ acquired the franchise and license rights of Dairy Queen Products of Texas, including its rights under the 1975 Franchise Agreement, during October 1980.

14. ADQ did not build, design, provide design or plans for, or otherwise participate in the construction of the Dairy Queen® store building located at 13122 Nacogdoches in San Antonio, Texas.

15. On or about December 31, 1985, Dairy Queen Investments, Inc. subfranchised its rights under the 1975 Franchise Agreement to the Dairy Queen® store building, equipment, premises, and other assets to R & S Dairy Queens, Inc. A true and correct copy of the 1985 Subfranchise Agreement is attached as Exhibit B.

16. On September 1, 1986, ADQ entered into an updated written agreement with R & S Dairy Queens, Inc. entitled "DAIRY QUEEN OPERATING AGREEMENT" ("1986 Franchise Agreement"), which replaced the 1975 Franchise Agreement. A true and correct copy of the 1986 Franchise Agreement is attached as Exhibit C.

17. Under the 1986 Franchise Agreement, ADQ granted R & S Dairy Queens, Inc. a license to continue using the Dairy Queen® name, Dairy Queen® Trademarks, Dairy Queen® business system and sales promotion programs in connection with the Dairy Queen® store located at 13122 Nacogdoches in San Antonio, Texas for an indefinite period of time.

18. On May 18, 1971, ADQ's predecessor in Texas, Dairy Queen Products of Texas, entered into a written agreement with Ronald Schreiber entitled "DAIRY QUEEN FRANCHISE AND LICENSE AGREEMENT." ("1971 Franchise Agreement"). A true and correct copy of the 1971 Franchise Agreement is attached as Exhibit D.

19. Under the 1971 Franchise Agreement, Ronald Schreiber received a license to use the Dairy Queen® name and Dairy Queen® Trademarks, and to open a Dairy Queen® store in a territory defined as all area within one half mile radius of a Dairy Queen® store located at about 9800 Perrin Beitel in San Antonio, Texas.

20. ADQ believes that during 1972 or 1973, Ronald Schreiber designed and constructed or had constructed the present Dairy Queen® store building located at 9726 Perrin Beitel in San Antonio, Texas.

21. ADQ acquired the franchise and license rights of Dairy Queen Products of Texas, including its rights under the 1971 Franchise Agreement during October 1980.

22. ADQ did not build, design, provide design or plans for, or otherwise participate in the construction of the Dairy Queen® store building located at 9726 Perrin Beitel in San Antonio, Texas.

23. On or about June 15, 1981, Ronald Schreiber sold his rights under the 1971 Franchise Agreement and the Dairy Queen® store's building, equipment, premises, and other assets to R & S Dairy Queens, Inc. ("1981 Transfer Agreement"). A true and correct copy of the 1981 Transfer Agreement is attached as Exhibit E.

24. Under the 1981 Transfer Agreement, R & S Dairy Queens, Inc. received a license to use the Dairy Queen® name and Dairy Queen® Trademarks, and to continue to operate the Dairy Queen® store located at 9726 Perrin Beitel in San Antonio, Texas.

25. R & S Dairy Queens, Inc. is a separate and distinct entity from ADQ. R & S Dairy Queens, Inc. and ADQ have no common ownership, employees, or management, and have no centralized control of labor operations.

26. R & S Dairy Queens, Inc. has operated the Dairy Queen® store located at 13122 Nacogdoches under the 1986 Franchise Agreement since September 1, 1986.

27. R & S Dairy Queens, Inc. has operated the Dairy Queen® store located at 9726 Perrin Beitel under the 1971 Franchise Agreement since June 15, 1981.

28. The buildings and premises from which the San Antonio Dairy Queen® Stores are operated, are owned by R & S Dairy Queens, Inc. ADQ has no ownership interest in either of these buildings or premises.

29. The buildings and premises front which the San Antonio Dairy Queen® Stores are operated are not leased by R & S Dairy Queens, Inc. to ADQ or anyone else.

30. ADQ does not have access to San Antonio Dairy Queen® Stores' buildings, other than through R & S Dairy Queens, Inc.

31. ADQ does not control the day-to-day operations of either of the San Antonio Dairy Queen® Stores.

32. ADQ has no employees at either of the San Antonio Dairy Queen® Stores on a daily basis. ADQ also has no employees that prepare products, clean the store, operate cash registers, set product prices, maintain store accounting records, pay store bills, order supplies, hire or fire store

managers or employees, serve store customers, or perform any other services for R & S Dairy Queens, Inc. at either of the San Antonio Dairy Queen® Stores.

FURTHER YOUR AFFIANT SAYETH NOT.

s/s
Lon Brew

Subscribed and sworn to before me
this 8th day of June, 1994.

Michelle Kelley
Notary Public

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